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IN THE

Supreme Court of the United States

October Term, 1955

No. 254

LYKENS HOSIERY MILLS, INC.,
Petitioner,

vs.

DWIGHT S. WILLIAMS CO., INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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49

INDEX

	PAGE
Petition:	
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes, Federal Rules and Regulations Involved	3
Statement	3
Reasons for Granting Writ	7
Conclusion	16
Appendix:	
Opinion of United States Court of Appeals, for the Fourth Circuit	17
Opinion of District Court	26
Federal Rules of Civil Procedure	33

Cases Cited

Augustine v. Bowles, 9th Cir., 149 F. (2d) 93	10
B. B. Pen Co. v. Brown & Bigelow, 92 F. Supp. 272	12
Benrose Fabrics Corp. v. Rocenstein, 183 F. (2d) 355	14
Best & Co. v. Miller, 167 F. (2d) 374	12
Blytheville Cotton Oil Co. v. Kurn, 6th Cir., 155 F. (2d) 467	9
Bradley v. Smith, 7th Cir., 114 F. (2d) 161	9
B. W. Harris Mfg. Co. v. Werber Sportswear Co., 138 F. (2d) 105	11 fn
Century Distilling Co. v. Schneider Brewing Co., 26 F. Supp. 936	14

PAGE

Cleo Syrup Corp. v. Coca-Cola Co., 8th Cir., 139 F. (2d) 416 8

Deep Rock Oil Corp. v. Salisbury, 8th Cir., 130 F. (2d) 387 9

Elbers v. Chicago Printed String Co., 39 F. (2d) 315 14

Electro-Metallurgical Co. v. Krupp Nirosta Co., 3rd Cir., 122 F. (2d) 314 8

Feil Co. v. John E. Robins Co., 7th Cir., 220 Fed. 650 ..... 10 fn

Fox River Paper Corp. v. United States, 7th Cir., 16 F. (2d) 639 9

Gillette Safety Razor Co. v. Triangle Mechanical Laboratories Corp., 4 F. Supp. 319 13

Gray v. United, 8th Cir., 109 F. (2d) 728 9

Hygrade Food Products Corp. v. H. D. Lee Mercantile Co., 46 F. (2d) 771 14

John Morrell Co. v. Doyle, 7th Cir., 97 F. (2d) 232 .. 10 fn

Johnson v. Blankenship, 8th Cir., 152 F. (2d) 99 ... 10

Kann v. Diamond Steel Co., 89 Fed. 706 14

Kaname Fijino v. Clark, 9th Cir., 172 F. (2d) 384 .. 9

Kincade v. Mikles, 8th Cir., 144 F. (2d) 784 9

King Pharr Canning Operations v. Pharr Canning Co., 85 F. Supp. 150 12

Leadway Stores Corp. v. Paul Hawkins Co., 57 U. S. P. Q. 171, 33 TM Rep. (II) 362 12

Lewis Machine Co. v. Aztec Lines, Inc., 7th Cir., 172 F. (2d) 746 9

Lucien Lelong, Inc. v. Lenel, Inc., 5th Cir., 181 F. (2d) 3 ..... 11 fn

MacDonnell v. Capital Co., 9th Cir., 130 F. (2d) 311 8

Marvel v. Pearl, 2d Cir., 133 Fed. 160 13

PAGE

May et al. v. Goodyear Tire & Rubber Co., 10 F. Supp. 249 11
Middle West Const. Inc. v. Metropolitan District, 2d Cir., 133 F. (2d) 468 8
Mishawaka Rubber Co. v. S. S. Kresge Co., Cir., 119 F. (2d) 316 14

Nee v. Linwood Securities Co., 8th Cir., 174 F. (2d) 434 9

Parfumerie Roger & Gallet v. John Wanamaker, D. C. Cir., 20 F. (2d) 283 13
Peck v. United States, 10th Cir., 172 F. (2d) 336 9
Prichard & Constance v. Aime, 5 F. Supp. 282 ..... 11 fn
Pulitzer Pub. Co. v. Houston Printing Co., Cir., 4 F. (2d) 924 12

Reo Motor Car Co. v. Traffic Motor Truck Corp., D. C. Cir., 4 F. (2d) 303 13
Rytex Co. v. Ryan, 7th Cir., 126 F. (2d) 952 ..... 11 fn

Schlitz Brewing Co. v. Houston Ice Co., 250 U. S. 28 13
Shapiro v. Rubens, 7th Cir., 166 F. (2d) 659 9
Schneider Brewing Co. v. Century Distilling Co., 107 F. (2d) 699 14
Steem-Electric Corp. v. Herzfeld-Phillipson Co., 7th Cir., 118 F. (2d) 122 ..... 10 fn
Stern Apparel Corp. v. Raingard, Inc., 87 F. Supp. 621 12

Thatenhorst v. United States, 10th Cir., 119 F. (2d) 567 10
Thomas Keerfoot and Co. v. Louis K. Leggett Co., 1st Cir., 67 F. (2d) 214 ..... 11 fn

United v. Protsch, 10th Cir., 137 F. 2d 92 9
United States v. McCain, 10th Cir., 118 F. (2d) 479 .. 10

PAGE

United States v. National Ass'n of Real Estate Bds., 339 U. S. 485 9

United States Tobacco Co. v. McGreenery, 144 Fed. 531 13

Walter M. Lowney Co. v. Chandler & Rudd Co., D. C. Cir., 12 F. (2d) 189 13

Western Stove v. George D. Roper Co., 82 F. Supp. 206 12

Statute Cited

28 U. S. C. 1254(1) 2

Other Authorities Cited

Federal Rules of Civil Procedure, Rule 52 3

Hopkinson Trademarks, Tradenames and Unfair Competition, Fourth Edition, p. 415 12

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Lykens Hosiery Mills, Inc. respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above case on May 15, 1956.

Opinions Below

The opinion of the District Court for the Western District of North Carolina (Appendix, pp. 26-32) was rendered on October 24, 1955, and is reported at 135 F. Supp. 213. The opinion of the Court of Appeals for the Fourth Circuit (Appendix, pp. 17-25) was rendered on May 15, 1956 and is not yet officially reported.

Jurisdiction

The judgment of the Court of Appeals for the Fourth Circuit was made and entered on May 15, 1956, and a copy thereof is appended to this petition in the Appendix at pages 17-25. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

In a civil action praying for a permanent injunction against alleged infringement of trade marks and alleged unfair competition, the District Court made findings of fact and conclusions of law in favor of the defendant, and petitioner herein, and dismissed the complaint of the plaintiff.

The action was predicated upon the adoption and use by the plaintiff below as a trade mark the word "Railroad" in connection with the design of a train in the sale of hosiery products and the alleged infringement thereof and the unfair competition by the defendant Lykens, the petitioner herein, by the adoption and use of the brand name "Trainman" and the pictorial design of a modern streamlined train in connection with the packaging of its men's work sock. The District Court determined that the defendant had neither infringed the trade mark of the plaintiff nor engaged in unfair competition.

The Court of Appeals for the Fourth Circuit reversed the judgment of the District Court and remanded the cause with instructions to grant the injunction sought by the plaintiff. In reversing the District Court on its findings of fact and conclusions of law, the Court of Appeals, in effect, retried the facts as determined by the District Judge and came to new conclusions. The questions presented are:

1. Whether the action of the Court of Appeals, in reversing the judgment of the District Court, was violative of Rule 52 of the Federal Rules of Civil Procedure, set forth in the Appendix herein, page 33, in that due regard was not given to the opportunity of the Trial Court to judge the credibility of the witnesses, and the findings of fact made by the District Court were not such that they are to be deemed clearly erroneous.

2. Whether the effect of the decision rendered by the Court of Appeals for the Fourth Circuit herein is such as to create a conflict of authority in the various United States Courts of Appeals with respect to the rights of parties to the use of names, designs and marks in the sale and merchandising of their products, in the face of a claim of infringement of trade mark and unfair competition, which conflict should be resolved by this Court.

3. Whether the decision of the Court of Appeals is in conflict wih the decisions of this Court with respect to the rights of parties to the use of names, designs and marks in the sale and merchandising of their products, in the face of a claim of infringement of trade mark and unfair competition.

Statutes, Federal Rules and Regulations Involved

The pertinent portions of Rule 52 of the Federal Rules of Civil Procedure are set forth in the Appendix at page 33.

Statement

This is a civil action arising from a claim by the plaintiff below (hereinafter referred to as "Williams") that the defendant below, and petitioner herein (hereinafter referred to as "Lykens"), had infringed certain trade marks of Williams and engaged in unfair competition.

Williams, in its complaint for relief seeking a permanent injunction and accounting, alleged the adoption and use by it as a trade mark of the word "Railroad" in connection with the design of a railroad train (not of modern design), in the sale of its hosiery products. Williams further alleged the adoption and use by Lykens of the trade mark "Trainman" and the use of the pictorial design of a railroad train in connection with the sale of its hosiery products, and contended that such use infringed its alleged trade mark "Railroad" and was unfair competition.

Lykens, for its answer, admitted the adoption and use by it of the trade mark "Lykens" for hosiery products manufactured and sold by it, and the use of a brand name, "Trainman", and a pictorial design of a modern streamlined railroad train, in connection with the packaging of its fine quality men's work socks.

Lykens further denied that Williams had any distinctive or prescriptive trade mark right to the exclusive use of the word "Railroad" or of the pictorial representation of a train, on the grounds of a general and common use of pictorial representations of a railroad train in connection with the sale of numerous products, as evidenced by many prior United States trade mark registrations in connection with the following products: one registration for hosiery; four for shoes; thirteen for overalls, and five for gloves.

Lykens, in addition, denied any confusing similarity between the name, design and packaging of Williams' product and its own, and disclaimed any intention to deceive and denied the existence of the likelihood of purchasers being confused by the two products.

The case was tried before United States District Judge Wilson Warlick who made findings of fact and conclusions of law in favor of Lykens, as set forth in his able and comprehensive opinion (Appendix, pp. 26-32)and there-

after rendered judgment in favor of Lykens and against Williams.

The District Judge, after an exhaustive analysis and comparison of the trade marks, packaging and designs adopted and used by the respective parties, came to the conclusion that there was "no similarity in the two labels and that no confusion would likely result to a purchaser who would exercise ordinary care and prudence, since each is so vastly different from the other". 135 F. Supp. 213, 217.

The District Judge went on to say, 135 F. Supp. 213, 217:

> "In fact it is inconceivable to me that one desiring to purchase work socks would be deceived in favor of defendant's 'Trainman Socks' as packaged over against the 'Railroad Sock' of the plaintiff. I therefore am of the opinion that the trade marks are wholly unlike and there is no likelihood of confusion: that there is no infringement of plaintiff's marks and that the plaintiff is not entitled to enjoin defendant from the use of its wrapper. That there has been no unfair competition and that plaintiff is not entitled to recover."

The District Judge found that there was no evidence of probative value offered of actual instances of confusion in the purchase of the goods marketed by the respective parties and, in coming to his conclusions, applied the following test: whether the similarity in the labels would properly deceive a purchaser who exercised ordinary prudence, not the careless buyer who makes no examination.

Thus, the Trial Court, after an exhaustive trial of the issues presented and a close examination of the trade marks, packaging and designs at issue, concluded that there was no similarity between the two and that no confusion would result to a purchaser who exercised ordinary care and prudence.

Thereafter, judgment having been rendered in favor of Lykens, Williams appealed from this judgment to the United States Court of Appeals for the Fourth Circuit. The appeal was argued on April 11, 1956 and decided on May 15, 1956. The Court of Appeals reversed the judgment of the District Court and remanded the case to that Court with instructions to issue the injunction sought by Williams.

The basis for this reversal is stated by the Court of Appeals, as follows:

> "A careful study of the entire record here convinces us that the conduct of Lykens cannot be explained by the long arm of coincidence. On the contrary, we think there was a clear attempt by Lykens 'to get under the umbrella' of Williams. In our view, the use by Lykens of 'Trainman' as contrasted with 'Railroad', the use of a picture of a train by Lykens and the similarity between the Williams' package and that of Lykens, lead us to the conclusion that Lykens has both infringed the trade-mark of Williams and has been guilty of unfair competition" (Appendix, p. 25).

The Court of Appeals, in substituting its own findings of fact for those of the District Judge, stated that the Court could not agree with the conclusion reached by the District Judge, "after a careful and painstaking study of the label, the contents, markings, get-up and the over-all appearance of each" (135 F. Supp. 213, 217), that there was no similarity in the two labels and that no confusion would likely result to a purchaser who would exercise ordinary care and prudence (Appendix, p. 24).

The Court further disregarded the findings of the District Judge and determined that there was "a clear likeness between the word 'Railroad' used here by Williams

and the word 'Trainman' employed by Lykens" (Appendix, p. 23). The Court further determined, again in the face of the findings of the District Judge, that there was a likelihood of confusion in this matter, emphasizing the one doubtful instance of actual confusion adduced by Williams (Appendix, p. 23).

Thus, the issue presented squarely on this application for a writ of certiorari is as follows: The District Court, after hearing all the evidence and witnesses, judging the credibility of the witnesses and examining exhaustively the label, the contents, markings, get-up and over-all appearance of the trade mark, designs and packaging employed by the respective parties, concluded that Lykens had not infringed the registered trade marks of Williams and that the acts of Lykens did not constitute unfair competition with Williams. The Court of Appeals, on the same record, and without the opportunity of hearing the evidence first-hand and judging the credibility of the witnesses, reached an entirely opposite conclusion.

Reasons for Granting Writ

1. The setting aside of the findings of fact of the District Court was violative of Rule 52 of the Federal Rules of Civil Procedure (Appendix, p. 33). Rule 52 of the Federal Rules of Civil Procedure provides in part as follows:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

In the instant case the District Court, "after a careful and painstaking study of the label, the contents, markings, get up, and the over all appearance of each", and a determi-

nation that "no evidence of probative value was offered of actual instances of confusion in the purchase of these goods", and "that no confusion would likely result to a purchaser who would exercise ordinary care and prudence", made the findings of fact that there was no similarity in the labels, that a reasonably prudent purchaser would not be deceived by the respective packaging of plaintiff's "Trainman Socks" and the defendant's "Railroad Sock", and that there is no likelihood of confusion between plaintiff's and defendant's products. 135 F. Supp. 216, 217.

The rule as to the power and function of the Court of Appeals on review is aptly set forth by Judge Sanborn in *Cleo Syrup Corp.* v. *Coca-Cola Co.*, 8th Cir., 139 F. (2d) 416, 417-418, cert. den. 321 U. S. 781, as follows:

> "This Court upon review will not retry issues of fact or substitute its judgment with respect to such issues for that of the trial court. (Citing cases.) The power of a trial court to decide doubtful issues of fact is not limited to deciding them correctly. (Citing cases.) In a non-jury case, this court may not set aside a finding of fact of a trial court unless there is no substantial evidence to sustain it, unless it is against the clear weight of evidence, or unless it was induced by an erroneous view of the law. (Citing cases)."

As to the rule that a reviewing court is bound to accept the Trial Court's findings of fact when no clear error appears, see *Electro-Metallurgical Co.* v. *Krupp Nirosta Co.*, 3rd Cir. 122 F. (2d) 314; *Middle West Const. Inc.* v. *Metropolitan District*, 2d Cir., 133 F. (2d) 468; *MacDonnell* v. *Capital Co.*, 9th Cir., 130 F. (2d) 311.

It has been said that the Court "will not disturb the findings unless they cannot be sustained upon any rational view of all the evidence including all reasonable infer-

ences". *Shapiro* v. *Rubens*, 7th Cir., 166 F. (2d) 659, 665-666; and the mere fact that the Trial Court could have viewed the facts differently or that the Court of Appeals might have done so if it had been the initial trier of the case, *Nee* v. *Linwood Securities Co.*, 8th Cir., 174 F. (2d) 434, 437; (see also *United* v. *Protsch*, 10th Cir., 137 F. (2d) 92), or that it disagrees with the findings of the District Court, *Blytheville Cotton Oil Co.* v. *Kurn*, 6th Cir., 155 F. (2d) 467, is not sufficient grounds to reverse the District Court. Mr. Justice Douglas in *United States* v. *National Ass'n. of Real Estate Bds.* (1950), 339 U. S. 485, 495-496, concisely states the rule, as follows: "It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent (citing cases). We are not given those choices, because our mandate is not to set aside findings of fact 'unless clearly erroneous'."

The Appellate Court considers only the evidence that supports the District Court's finding, it does not weigh the evidence or resolve any conflicts therein. *Fox River Paper Corp.* v. *United States*, 7th Cir., 16 F. (2d) 639; *Peck* v. *United States*, 10th Cir., 172 F. (2d) 336; *Kaname Fijino* v. *Clark*, 9th Cir., 172 F. (2d) 384; and in considering the record, the Court of Appeals must look only to the evidence most favorable to the District Court's findings and such reasonable inferences as may be drawn from such evidence. *Lewis Machine Co.* v. *Aztec Lines, Inc.*, 7th Cir., 172 F. (2d) 746.

In the case at bar, there is substantial evidence to sustain the findings of fact made by the District Court and therefore they cannot be said to be erroneous. *Kincade* v. *Mikles*, 8th Cir., 144 F. (2d) 784; *Gray* v. *United*, 8th Cir., 109 F. (2d) 728; *Deep Rock Oil Corp.* v. *Salisbury*, 8th Cir., 130 F. (2d) 387; *Bradley* v. *Smith*, 7th Cir., 114 F. (2d) 161. The credible evidence having probative value does not indicate any evidence of actual confusion (135 F. Supp.

216). The credibility of witnesses is within the province of the trier of the facts and any fact finding predicated on the Trial Judge's opportunity to hear and observe the witnesses will be given great weight and will be disturbed only in the most unusual circumstances. *Thatenhorst* v. *United States*, 10th Cir., 119 F. (2d) 567; *Augustine* v. *Bowles*, 9th Cir., 149 F. (2d) 93; *Johnson* v. *Blankenship*, 8th Cir., 152 F. (2d) 99; *United States* v. *McCain*, 10th Cir., 118 F. (2d) 479.

2. There is a conflict amongst the various Courts of Appeals as relates to the rights of parties to the use of names, designs and marks under a claim of infringement and unfair competition.

Although certain general rules relating to trade mark infringement and unfair competition are recognized by the courts, the application of these rules has left a myriad of cases in which a litigant finds himself in limbo when endeavoring to ascertain his rights.

The Court of Appeals in reversing the District Court stated that they "think there is a likeness between the word 'Railroad' used here by Williams, and the word 'Trainman' employed by Lykens" (Appendix, p. 23), citing cases purporting to sustain the position of the respondent-plaintiff. A reference to the case law shows many decisions holding no similarity or infringement in names clearly more similar by mere eye perusal.

The following names were held not to be infringing:

"Sal-Vet" not infringed by "Sal Tone".[1]
"Strongheart" not infringed by "Red Heart".[2]
"Steem-Electric" not infringed by "Steam-O-Matic".[3]

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[1] *Feil Co.* v. *John E. Robins Co.*, 7th Cir., 220 Fed. 650.

[2] *John Morrell Co.* v. *Doyle*, 7th Cir., 97 F. (2d) 232.

[3] *Steem-Electric Corp.* v. *Herzfeld-Phillipson Co.*, 7th Cir., 118 F. (2d) 122.

"Vapex" not infringed by "Vapure".[4]
"Rytex" not infringed by "Rynart".[5]
"Balaiza" not infringed by "Bellezza".[6]
"Zero King" not infringed by "Zeroland".[7]
"Amami" not infringed by "Aime".[8]

It is urged that a dangerous precedent has been set by the Court of Appeals. The Court has given the plaintiff "rather broad rights to any device, mark or symbol of this character (railroad mark and the pictorial representation of a train) within the significance and meaning of train or railroad, as applied to men's socks" (Appendix, p. 22). The preemption of the entire field of men's hosiery is but a step forward to arrogating to the plaintiff similar rights with respect to other items of wearing apparel, since many courts have held that one is not necessarily limited to the same articles in his endeavor to enjoin the use of a similar name.

The effect of the decision of the Court of Appeals is two-fold: (1) to ignore completely the existence of at least twenty-three (23) prior registered trade marks dealing with wearing apparel (Plaintiff's Exhibit 7, R., p. 15) containing a pictorial illustration of a train or in some way related to trains; (2) to grant plaintiff the exclusive rights to a pictorial representation of a train that has been and is *publici juris*. Obtaining a trade mark under the statute gives the registrant no substantive rights beyond what they would be under common law principles. Such registration merely gives jurisdiction to United States courts and gives the registrant certain procedural advantages. *May, et al.*

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[4] *Thomas Keerfoot and Co.* v. *Louis K. Leggett Co.*, 1st Cir., 67 F. (2d) 214.

[5] *Rytex Co.* v. *Ryan*, 7th Cir., 126 F. (2d) 952.

[6] *Lucien Lelong, Inc.* v. *Lenel, Inc.*, 5th Cir., 181 F. (2d) 3.

[7] *B. W. Harris Mfg. Co.* v. *Werber Sportwear Co.*, 138 F. (2d) 105.

[8] *Prichard & Constance* v. *Aime*, 5 F. Supp. 282.

v. *Goolyear Tire & Rubber Co.*, 10 F. Supp. 249; *Leadway Stores Corp.* v. *Paul Hawkins Co.*, 57 U. S. P. Q. 171, 33 TM Rep. (II) 362; *B. B. Pen Co.* v. *Brown & Bigelow*, 92 F. Supp. 272, aff'd 191 F. (2d) 939, cert. den. 343 U. S. 920.

> "Registration does not create a trademark. It is not essential to its validity * * * Since as it appears these statutes confer no rights whatever, but merely furnish a method for spreading on the records the evidence of already existing rights, plaintiff can draw no comfort from them, and his cause must stand on the common law." *Pulitzer Pub. Co.* v. *Houston Printing Co.*, 4 F. (2d) 924, 926-7, aff'd 11 F. (2d) 834. (See also *Stern Apparel Corp.* v. *Raingard, Inc.*, 87 F. Supp. 621; *Best & Co.* v. *Miller*, 167 F. (2d) 374, cert. den. 335 U. S. 818; *King Pharr Canning Operations* v. *Pharr Canning Co.*, 85 F. Supp. 150; *Western Stove* v. *George D. Roper Co.*, 82 F. Supp. 206.)

Hopkins on Trademarks, Tradenames and Unfair Competition, Fourth Edition, at page 415, concisely states the rule:

> "The fact that the Complainant's trademark is registered does not deprive the public of the right to use a similar name which was common to the trade before registration."

So, here, the mere fact that the plaintiff obtained a registration of the pictorial illustration of a train (as did twenty-three prior registrants) did not grant to the plaintiff the exclusive right to employ any and all pictorial illustrations of trains and anything "within the significance and meaning of train or railroad", to the exclusion of all others.

The doctrine of unfair competition cannot be invoked successfully to abridge the freedom of trade competition.

Marvel v. *Pearl*, 2d Cir., 133 Fed. 160, 162. See also *Gillette Safety Razor Co.* v. *Triangle Mechanical Laboratories Corp.*, 4 F. Supp. 319.

The courts refuse to grant monopolies on words within the public domain, *Reo Motor Car Co.* v. *Traffic Motor Truck Corp.*, D. C. Cir., 4 F. (2d) 303;[9] or which have come into use as a descriptive term, *Parfumerie Roger & Gallet* v. *John Wanamaker*, D. C. Cir., 20 F. (2d) 283;[10] or pictures which are *publici juris*, *Walter M. Lowney Co.* v. *Chandler & Rudd Co.*, D. C. Cir., 12 F. (2d) 189.[11]

Relief has been denied where the resemblance is principally in features often combined in common use, even though there may be some confusion. *United States Tobacco Co.* v. *McGreenery*, 144 Fed. 531, aff'd 144 Fed. 1002. See also *Schlitz Brewing Co.* v. *Houston Ice Co.*, 250 U. S. 28, 29, where labels were only differentiated by the presence of the manufacturer's name. In the case at bar, the defendant's label was clearly differentiated from plaintiff's label by the conspicuous presence of the name "Lykens" thereon.

It is respectfully submitted that the decision of the Court of Appeals below is in conflict with the decisions in other circuits. The effect of this decision is so disruptive of free competition and arrogates to the plaintiff so broad an area in the use of a name and design in the public domain that it creates a dangerous precedent that should not be allowed to stand. In this respect, the questions presented by the decision rendered by the Court of Appeals

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[9] The owner of mark "Speed Wagon" could not prohibit registration of "Speedboy", because to do so would be to prevent the use of a purely descriptive word to describe a product.

[10] "Fleurs d'Amour" and "Bouquet d'Amour" not infringed by "Charme d'Amor" because word "amour" was found to have "come into use as a descriptive term".

[11] Two marks each containing a picture of a mattress, not similar since picture was *publici juris*.

for the Fourth Circuit are of paramount importance and should be resolved by this Court.

3. The decision of the Court of Appeals is in conflict with the policy of this Court. It was incumbent upon the plaintiff, and it had the burden of proof, to demonstrate by credible evidence that the ordinary mass of purchasers giving that attention that reasonable purchasers usually give in buying the article in question would be confused and deceived. *Mishawaka Rubber Co.* v. *S. S. Kresge Co.*, 119 F. (2d) 316, cert. granted, 314 U. S. 603, reversed, 316 U. S. 203. See also: *Kann* v. *Diamond Steel Co.*, 89 Fed. 706, 710. The proof must be that the goods are so similar that *prudent* buyers would be deceived. *Century Distilling Co.* v. *Schneider Brewing Co.*, 26 F. Supp. 936, 937, aff'd 107 F. (2d) 699.

The confusion must be as to the source of origin of the product. *Benrose Fabrics Corp.* v. *Rocenstein*, 183 F. (2d) 355, 358.

The rule laid down by the courts in refusing to interfere with the use of a name or mark is as follows:

> "The test is whether the similitude of the labels would probably deceive a purchaser who exercises ordinary prudence, not the careless buyer who makes no examination." *Schneider Brewing Co.* v. *Century Distilling Co.*, 107 F. (2d) 699, 704.
>
> "One may not fail to use his senses and then say he has been misled." *Elbers* v. *Chicago Printed String Co.*, 39 F. (2d) 315, 318. See also: *Hygrade Food Products Corp.* v. *H. D. Lee Mercantile Co.*, 46 F. (2d) 771.

This was the test applied by the District Court in determining there was no similarity in the labels. 135 F. Supp. 216, 217. It should be noted, however, that the Court of Appeals for the Fourth Circuit seemed to take for granted

that the District Court, in arriving at its decision that there was no such similarity in the labels that would deceive a purchaser who exercised ordinary prudence, applied the test of placing the two labels side by side. There is no evidence to support this assumption by the Court of Appeals.

In addition, the attention of this Court is invited to the fact that the Court of Appeals, in its opinion, quoted with disapproval certain language from the opinion of the District Judge, as follows:

> "After a careful and painstaking study of the label, the contents, markings, get up and the over all appearance of each, I come up with the conclusion that there is no similarity in the two labels and that no confusion would likely result to a purchaser who would exercise ordinary care and prudence." (Appendix, p. 24).

Unfortunately, the quotation as it stands is somewhat misleading since it is not the entire language of the District Court. The Court of Appeals has not quoted the entire sentence as it appears in the District Court opinion, and has failed to indicate any omission of the following: "* * * since each is so vastly different from the other." 135 F. Supp. 217.

The sentence that follows in the opinion of the District Court clearly demonstrates how strongly the District Judge felt that there was no similarity in the labels and packaging: "In fact it is inconceivable to me that one desiring to purchase work socks would be deceived in favor of defendant's 'Trainman Socks' as packaged over against the 'Railroad Sock' of the plaintiff." 135 F. Supp. 217.

The reversal by the Court of Appeals of these findings by the District Court is completely unwarranted by the facts, as determined by the trier of the facts, and by the decisions of this Court, which establish the rules to be

followed by the Federal judiciary in cases such as these. The Court of Appeals has enunciated a radical departure from the decisions of this Court and of the other Circuits, by allowing such a usurpation of a name and mark that are properly in the field of the public domain.

4. The questions presented by this case are of great and recurring significance, both in the administration of the Federal appellate courts with respect to the scope of review by an appellate court and with respect to the delimitation of the rights of a second user of a particular mark, label, design or package that is properly in the field of the public domain, in the face of a claim of trade mark infringement and unfair competition. The serious question of unauthorized fact finding by the Court of Appeals for the Fourth Circuit and the disruptive effect of the decision below, if unreversed, upon the free competition between merchants in commerce make this case a peculiarly appropriate one for the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

HAROLD L. LIPTON,
of BOOTH, LIPTON & LIPTON,
FRANCIS H. FAIRLEY,
Counsel for Petitioner.

HAROLD A. LIPTON,
EDGAR H. BOOTH,
of Booth, Lipton & Lipton,
of Counsel.

APPENDIX

Opinion of United States Court of Appeals, for the Fourth Circuit

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 7135

DWIGHT S. WILLIAMS CO., INC.,

Appellant,

versus

LYKENS HOSIERY MILLS, INC.,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, AT CHARLOTTE.

(Argued April 11, 1956. Decided May 15, 1956.)

Before:

SOPER and DOBIE, *Circuit Judges*, and PAUL, *District Judge*.

PAUL B. BELL (Paul B. Eaton, and Eaton, Bell, Hunt & Seltzer on brief) for Appellant; and

FRANCIS H. FAIRLEY (Harold A. Lipton and Booth, Lipton & Lipton on brief) for Appellee.

DOBIE, *Circuit Judge*:

This civil action, alleging trademark infringement and unfair competition, was instituted in the United States District Court for the Western District of North Carolina by Dwight S. Williams Co., Inc. (hereinafter called Williams) against Lykens Hosiery Mills, Inc. (hereinafter called Lykens). Williams alleged the adoption and long and continuous usage of certain trademarks, in connection with the sale of men's hosiery. These comprise the words "The RAILROAD Sock" used both alone and in connection with the pictorial illustration of a train. Williams also alleged the adoption and long and continuous usage of various train and railroad insignia in connection with the packaging and advertising of its men's work socks together with various pictorial illustrations carrying out a general train and railroad theme in assocation with its trademarks.

During the latter part of 1953, Lykens began manufacturing and shortly thereafter selling and distributing men's work socks throughout the United States under the name TRAINMAN used in association with the pictorial illustration of a train. Williams further alleged that these sales by Lykens, in a dress and package similar to Williams' constituted an effort to trade upon and capitalize upon the good will and identity established by Williams in connection with its trademark "The RAILROAD Sock" and associated marks and designs and that these acts by Lykens constituted unfair competition and trademark infringement.

Lykens admitted use of the trademark TRAINMAN together with pictorial illustrations of a train and denied the ownership by Williams of the trademark "The RAILROAD Sock" and pictorial train illustration. Lykens further alleged that its use of the name TRAINMAN together with a pictorial illustration of a train was lawful in view of alleged uses by others of a train design or illustration in association with various other types of wearing apparel.

Upon trial of the case, the District Judge rendered judgment in favor of Lykens and Williams has appealed to us. The opinion of the District Judge is reported in 135 F. Supp. 213.

Two questions are before us on this appeal:

(1) Has Lykens infringed the registered trademarks of Williams by using in connection with the advertising and sale of its work socks, the name "TRAINMAN" together with a pictorial illustration of a train?

(2) Do the acts of Lykens constitute unfair competition with Williams?

We think these questions must be answered in the affirmative and that the judgment below must be reversed.

Williams is a New York corporation engaged in the business of selling hosiery. The business was established prior to 1911. Williams and its predecessors are now and have been continuously since prior to 1911 engaged in selling hosiery wholesale in their own right and as commission agents for various mills and doing a general wholesale merchandise business in hosiery. This hosiery is sold throughout the United States through wholesale distributors who in turn sell to retailers.

Robert P. Steele and Co., the predecessor of Williams, sometime prior to July, 1913, adopted and began using as a trademark for men's hosiery the pictorial illustration of a train in connection with the words "The RAILROAD Sock". Since prior to July, 1913, Williams and its predecessors have continuously used and are now using the trademark in connection with their sales of men's work socks. The mark has been used in various ways, such as "The RAILROAD Sock" alone, and in combination with pictorial illustrations of trains, both modern and old types. Since at least as early as 1950, and prior to the entry of Lykens into the field, Williams has used in association with its mark, both in packaging and advertising its work socks,

various railroad and train insignia and pictorial illustrations carrying out a general train and railroad theme.

On July 10, 1913, Robert P. Steele and Co. applied for a copyright on the label it was then using which showed the pictorial representation of a train and "The RAILROAD Sock", and on November 18, 1913, the United States Patent Office issued a Certificate of Copyright, No. 3424, covering this label.

On November 10, 1948, Williams applied for registration of its trademark showing the words "The RAILROAD Sock" and the pictorial representation of a modern locomotive and train and on May 2, 1950, the United States Patent Office issued Registration No. 524,743 to Williams for this mark used on socks for men. Williams also owns Registration No. 584,507, issued January 12, 1954, covering the pictorial illustration of an older type locomotive and train; Registration No. 600,543, issued January 4, 1955, for "Sock Line of the Nation"; and Registration No. 602,189, issued February 15, 1955, for "The RAILROAD Sock". All of these registrations were for socks for men and all pertained to the general railroad and train theme used by Williams in selling its work socks.

Williams and its predecessors have spent large sums of money in advertising and popularizing "The RAILROAD Sock" mark in connection with the general train theme. During the years 1951 through 1954, inclusive, Williams spent $42,037.50 in advertising its RAILROAD sock and during that time sold 937,000 dozen pairs of RAILROAD socks. Williams also sells other types of socks under various other trademarks but sales of its RAILROAD socks presently constitute approximately twenty per cent of its business.

Lykens is a corporation chartered under the laws of Pennsylvania in 1946. It is a successor to the firm of Lykens Hosiery Mills, organized in 1938 and is engaged in the business of manufacturing and selling men's hosiery including men's work socks. It formerly conducted its manufacturing operations in Lykens, Pennsylvania, and

in the early part of 1954 moved its entire manufacturing business to Marion, North Carolina.

Sometime prior to 1954, Lykens began using the trademarks LIPTON, LYKENS and THRIFT-PAK on its socks and Lykens is still using these marks.

In the latter part of 1953, Lykens began manufacturing and shortly thereafter selling and distributing men's work socks throughout the United States under the name and style TRAINMAN with a pictorial illustration of a train. Promptly after notice of these sales by Lykens, on January 7, 1954, Williams, through its attorney, notified Lykens of these rights and trademarks of Williams; it also complained of the use by Lykens of the word TRAINMAN and the pictorial illustration of a train. Lykens has continued to sell men's work socks on an expanding nationwide basis under the TRAINMAN name in packages bearing pictorial illustrations of trains.

The Trademark Act of 1946, § 45, 15 U. S. C. A. § 1127, sets out:

> "The term 'trademark' includes any word, name, symbol or device or any combination thereof adopted and used by a manufacturer or merchant to identify his goods and distinguish them from those manufactured or sold by others."

When a manufacturer or dealer has identified his goods by a trademark, which points to him as the source thereof, others are excluded from applying the same or a similar mark to such goods and the function of a trademark is to designate the goods as the product of a particular trader and to protect his good will against the sale of another's product as his. *Hanover Star Milling Co.* v. *Metcalf*, 240 U. S. 403; *McLean* v. *Flemming*, 96 U. S. 245, 254.

In *United Drug Co.* v. *Theodore Rectanus Co.*, 248 U. S. 90, 98, Mr. Justice Pitney described a trademark as:

> "a convenient means for facilitating the protection of one's good-will in trade by placing a distinguish-

ing mark or symbol—a commercial signature—upon the merchandise or the package in which it is sold."

In *Mishawaka Rubber & Woolen Mfg. Co.* v. *S. S. Kresge Co.*, 316 U. S. 203, 205, 86 L. Ed. 1381, 62 S. Ct. 1022, Mr. Justice Frankfurter stated:

> "The protection of trade-marks is the law's recognition of the psychological function of symbols. If it is true that we live by symbols, it is no less true that we purchase goods by them. A trade-mark is a merchandising short-cut which induces a purchaser to select what he wants or what he has been led to believe he wants."

In *Aerick* v. *Rockmont Envelope Co.*, 155 F. (2d) 568, 571, 572, Circuit Judge Murrah observed:

> "Although the primary purpose of a trade-mark is to indicate the origin, manufacture and ownership of the article in the mind of the purchasing public, it it usually associated with the quality of the product which it symbolizes. Trade-marks are no longer 'regarded simply as an indicium of a known source', they now 'perform the additional function of an advertising and selling device'."

The rights of Williams are not limited to the exact style shown on its package or in its registrations. Its adoption and continuous usage of the railroad mark and the pictorial illustration of a train together with other train and railroad indicia and symbols for many years prior to the entry of Lykens into the field give to Williams rather broad rights to any device, mark or symbol of this character within the significance and meaning of train or railroad as applied to men's socks.

In *McLean* v. *Fleming*, 96 U. S. 245, 251, Mr. Justice Clifford thus stated the classic test in these cases:

> "What degree of resemblance is necessary to constitute an infringement is incapable of exact definition, as applicable to all cases. All that courts of justice can do, in that regard, is to say that no trader can adopt a trade-mark so resembling that of another trader, as that ordinary purchasers, buying with ordinary caution are likely to be misled."

In determining infringement, it is not necessary to prove actual confusion. The test is whether there is likelihood of confusion. *Noll* v. *Rinex Laboratories Co.*, 25 F. Supp. 239, 240; *Mershon Co.* v. *Pachmayr*, 220 F. (2d) 879. Nevertheless, at the trial below, Williams did prove one instance of actual confusion where a clerk handed Mr. Charles Trotter "RAILROAD" socks when he asked for "TRAINMAN" socks. The District Court excluded additional evidence offered by Williams relating to other confusion in the trade.

See, also, *National NuGrape Co.* v. *Guest*, 69 F. Supp. 863, aff'd 164 F. (2d) 874, cert. denied 333 U. S. 874; *Crawford-Austin Manufacturing Co.* v. *Clifton Manufacturing Co.*, 25 F. (2d) 976, aff'd 30 F. (2d) 392; *Gehl* v. *Hebe Co.*, 276 Fed. 271; *Lone Ranger, Inc.* v. *Currey*, 79 F. Supp. 190; *Plough, Inc.* v. *Intercity Oil Co.*, 26 F. Supp. 978.

We think there is a clear likeness between the word "Railroad" used here by Williams and the word "Trainmen" employed by Lykens. In *Holeproof Hosiery Co.* v. *Fitts*, 167 Fed. 378, as to hosiery, "No-Hole" was held to be too close to "Holeproof." In *Wonder Manufacturing Co.* v. *Block*, 249 Fed. 748, "Wonder" was decided to convey the same idea as "Wizard". "Wearever" or "Everwear" was declared to simulate "Everlasting" in *Aluminum Cooking Utensil Co.* v. *National Aluminum Works*, 226 Fed. 815. And in *Kraft-Phenix Cheese Corporation* v.

R. E. Robertson, Inc., 9 F. Supp. 125, the court would not permit "Wonder Mix" to be used when contrasted with "Miracle Whip."

In his opinion below, the District Judge stated (135 F. Supp. 213, 217):

> "After a careful and painstaking study of the label, the contents, markings, get up and the over all appearance of each, I come up with the conclusion that there is no similarity in the two labels and that no confusion would likely result to a purchaser who would exercise ordinary care and prudence."

With this we cannot agree.

We think the District Judge laid too much stress on the ocular comparison of the packages of Williams and Lykens, when laid side by side. The test here is not *solely* such a juxtapositional comparison. The whole background of the case must be considered. Yet we do find here striking similarity between the two packages, in which the socks of Williams and those of Lykens are sold, in color, shape and general pattern.

In *Avrick* v. *Rockmont Envelope Co.*, 155 F. (2d) 568, 572-573, Circuit Judge Murrah declared:

> "It is contended that the trial court merely made a side by side visual comparison of the two specimens, and judged the question of infringement solely by the reaction of his trained mind to such comparison. It is not the distinguishing details manifest by ocular comparison in juxtaposition which determines confusing similarity, the test is more objective than that. It is the total effect produced by the designation in the mind of the ordinary purchaser exercising due care in the market place. A prospective purchaser does not ordinarily carry a sample or specimen of the article he knows well enough to

> call by its trade name, he necessarily depends upon the mental picture of that which symbolizes origin and ownership of the thing desired."

A careful study of the entire record here convinces us that the conduct of Lykens cannot be explained by the long arm of coincidence. On the contrary, we think there was a clear attempt by Lykens "to get under the umbrella" of Williams. In our view, the use by Lykens of "Trainman" as contrasted with "Railroad", the use of a picture of a train by Lykens and the similarity between the Williams package and that of Lykens, lead us to the conclusion that Lykens has both infringed the trade-mark of Williams and has been guilty of unfair competition.

Accordingly, the judgment of the District Court must be reversed and the case is remanded to that court with instructions to issue the injunction sought by Williams and for such other and further relief as may be consistent with this opinion.

Reversed and remanded.

Opinion of District Court

IN THE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NORTH CAROLINA

CHARLOTTE DIVISION

Civil Action 1026

—o—

DWIGHT S. WILLIAMS CO., INC.,

Plaintiff,

vs.

LYKENS HOSIERY MILLS, INC.,

Defendant.

—o—

EATON AND BELL, Johnston Building, Charlotte, N. C.
Attorneys for Plaintiff.

FRANCIS H. FAIRLEY, Law Building, Charlotte, N. C.

WILSON WARLICK, *District Judge*

This is an action for unfair competition and infringement filed in the Charlotte Division of this District, and heard by the court without a jury on oral evidence, stipulations and other provided means. The hearing brought out facts as follows:

Plaintiff is a New York corporation engaged in selling hosiery with its place of business on Fifth Avenue in New York City. It does not manufacture hose but as selling agent has its products manufactured for it and under its direction, and thereafter sells to the hosiery trade. It and its predecessors have been engaged continuously as such for approximately thirty five years. On occasion it acts

as commission agent and factor. It sells hosiery over the greater portion of the United States.

The Defendant, Lykens Hosiery Mills, Inc., is a Pennsylvania corporation, and it and its predecessors in title have been engaged in manufacturing men's hose and work socks for approximately thirty years, or more. Formerly its manufacturing plant was located in Lykens, Pennsylvania, but it more recently moved south and is now located in Marion, in the Western District of North Carolina. Subsequent to the institution of this action against it, defendant experienced financial difficulties and until recently its operation was permitted under an order allowing the debtor to remain in possession. At the time of the trial that was its actual status. It now has adjusted its difficulties and having satisfied its creditors is in full possession of the assets of the corporation.

Plaintiff had at a time prior to the charges herein complained of, adopted as a trademark in its hoisery sales, the name "Railroad" in connection with a design of a train and secured on its application two certain registrations with the United States Patent Office for such trademark, all as appears on the exhibits being attached to the complaint filed in the action—one dated May 2, 1950, for Registration #524,743, and another dated January 12, 1954 for Registration #584,507, each showing a train as the design. That these designs are stamped on a transparent cellophane wrapper by a process now available and are used as decorative wrappers on the packaged socks. That each such package holds three pairs of men's work socks.

That on January 4, 1955, and during the pendency of this action, plaintiff registered in the Patent Office under #600,543, this trademark: "Sock Line of the Nation" and on February 15, 1955, under registration #602,189, plaintiff secured "The Railroad Sock" as a trademark. Approximately 20% of the plaintiff's business is derived from the sale of the "Railroad Sock".

The wrapper in which plaintiff markets its "Railroad" work socks and from which the alleged unfair competition and infringement comes about by the marketing process of the defendant is approximately eleven inches long and five inches wide, is made of transparent cellophane and by a process of lamination in conjunction with printing, the following is stamped thereon: A picture of a railroad train of the vintage of one hundred years ago, the engine being much alike in appearance to the "General" now kept in the passenger station of the L & N Railroad in Chattanooga or the "Texas" which is preserved for posterity in Grant Park in Atlanta. It is a replica of a wood burner with large stack and has coupled to it two passenger coaches of the type used in that far off day. The engine and the coaches are painted black, red and green. The smoke coming from the stack is in red and as it flows from the engine and over the tender and coaches, has the word "Railroad Sock" printed in white letters on it. Immediately under that is "Registered U. S. Pat. Office". On a green background, in white letters surrounded by a red border and placed under the engine and coaches will be found these words "Guaranteed a full month's wear in every pair." "Nylon Heel and toe reinforced". In front of the engine this appears: "3 pairs" the figure three being in white with green background and the word pair being printed in red. At the seam on the side of the wrapper are these words in red, bordered with black: "Sock line of the Nation". At the top and bottom of the cellophane wrapper one sees black lines running more or less horizontally. On both the front and the back of the wrapper will be found a genuine facsimile in appearance of the registered trademarks of the following railroads: New York Central System, Nickel Plate Road, New York, New Haven and Hartford Railroad, Burlington Route, Northern Pacific, Illinois Central, the Seaboard Airline Railroad, Reading Lines, Southern Serves the South, the Great Northern Rail-

way, Cotton Belt Route, L & N, Boston & Maine, Wabash and Sante Fe line. All of which the plaintiff secured the right to use by authority of each individual railroad company. On the back of the wrapper again appears "The Railroad Sock". This unquestionably constitutes a unique package, exceptionally attractive, and one that would be unusually easy to retain in the mind. Plaintiff has expended considerable monies through the years in advertising the sale of its socks.

This is the wrapper that the defendant is charged with infringing by its use of a package wrapper in the sale of its manufactured products.

The defendant in more recent years and particularly since marketing conditions have radically changed, has used different trade labels and packages in the sale of its various manufactured products and has advertised its goods for sale under some five or six of their different labelled trade names. Sometime during 1953 it began the marketing of its men's anklets and work hose in a transparent cellophane package with the following markings thereon: The word "Lykens" in white letters on a red oval background. In red letters on a white background these words are found: "Men's Anklets". In white letters on a red background "3 pair" appears. Under that is a present day streamline passenger engine with the cars attached as far as the design appears. On the front of the engine where ordinarily the railroad name or number appears, the letter "L" is found and in some of the allegedly infringed wrappers the word "Lykens" appears in place of the "L". This train is painted white and black. Thereunder these statements are found: "Union Made. Nylon Reinforced Heel and Toe. 100% combed cotton. Laundry Tested." "Size." "Color". On the back of the wrapper the word "Lykens" appears followed by the word "Trainman" and a small picture of the streamline likewise is shown identically as that shown on the front of the wrapper.

The above recitation accurately describes the alleged infringing wrapper in which the defendant markets three pairs of its anklets or work hose and is that product which is charged with the infringement and unfair competition as alleged in the Complaint. This wrapper is attached to these findings and made a part thereof.

The defendant has advertised these socks rather extensively since 1953 as it has done in the sale of all of its products and has evidently expended considerable monies in its efforts to successfully place them on the market.

Among other things plaintiff contends that the word "Trainman" and "Railroad" have the same significance and that defendant's use of the word "Trainman" and the pictorial illustration of a train constitute a colorable imitation of the plaintiff's "Railroad" trademark; and is so similar as likely to cause confusion or mistake and to deceive a purchaser as to the source and origin of the product, and that such infringement of plaintiff's trademark constitutes unfair competition which entitles plaintiff to the injunctive relief sought and the damage later to be determined. Plaintiff does not contend that the defendant's wrapper is a copy of plaintiff's trademark, but does contend that it is a colorable imitation thereof.

The defendant contends that there is no similarity in the wrapper used. That it had no knowledge of plaintiff's wrapper and that it adopted the word "Trainman" as a good suggestion in the sale of its work socks through repeated conversations with various employees of railroad companies in the Lykens, Pennsylvania area. That its modern streamline train could in no wise be confused with the woodburner used by the plaintiff in the marketing of its socks.

Much has been written as to the law in matters of this kind but little it seems could be gained from an assembling of the various authorities that are cited and the law that is contended as being applicable. The term trademark

includes any word, name, symbol, or device or any combination thereof adopted and used by a manufacturer or merchant to identify his goods and distinguish them from those manufactured or sold by others. Trademark Act of 1946, Sec. 45, 15 U. S. C. A. 1127.

> "The proper function of a trademark is that by association with goods it becomes a means of identification of the origin or ownership of the article and hence a symbol of good will. This essential element is the same both in trademark cases and in cases of unfair competition unaccompanied with trademark infringement. The law of trademarks is but a part of the law of unfair competition. Hanover Star Milling Co. v. Metcalf, 240 U. S. 403, 413, 36 S. Ct. 357, 60 L. Ed. 713; Walgreen Drug Stores v. Obear-Nestor Glass Co., 8 Cir., 113 F. 2d 956, 961; F. W. Fitch Co. v. Camille, Inc., 8 Cir. 106 F. 2d 635."

Since no evidence of probative value was offered of actual instances of confusion in the purchase of these goods, the test comes to that of deceptive similarity, and this is whether

> "ordinary purchasers, buying under the usual conditions in the trade and exercising ordinary care, would likely be induced to purchase the article to which the accused trademark is affixed, believing it to be the plaintiff's article. Queen Mfg. Co. v. Isaac Ginsberg & Bros., Inc., 8 Cir. 25 F. 2d 284, 287; S. S. Kresge Co. v. Winget Kickernick Co., 8 Cir., 96 F. 2d 978, 987. Seven Up Co. v. Cheer Up Sales Co., 148 F. 2d 909.
>
> "It is the generally accepted rule that a designation is confusingly similar to a trademark if an ordinary prospective purchaser, exercising due care in the circumstances, is likely to regard it as coming from the same source as the trademarked article. Schneider

Brewing Co. v. Century Distilling Co., supra [10 Cir., 107 F. 2d 699]; Victor American Fuel Co. v. Huerfano Agency Co., D. C., 15 F. 2d 578." Avrick et al. v. Rockmont Envelope Co., 155 F. 2d 568, 572.

The test finally comes to this: Whether the similitude in the labels would properly deceive a purchaser who exercised ordinary prudence, not the careless buyer who makes no examination. *Ph. Schneider Brewing Co.* v. *Century Distillating Co.*, 107 F. 2d 699.

After a careful and painstaking study of the label, the contents, markings, get up and the over all appearance of each, I come up with the conclusion that there is no similarity in the two labels and that no confusion would likely result to a purchaser who would exercise ordinary care and prudence, since each is so vastly different from the other. In fact it is inconceivable to me that one desiring to purchase work socks would be deceived in favor of defendant's "Trainman Socks" as packaged over against the "Railroad Sock" of the plaintiff. I therefore am of the opinion that the trademarks are wholly unalike and that there is no likelihood of confusion; that there is no infringement of plaintiff's marks and that the plaintiff is not entitled to enjoin the defendant from the use of its wrapper. That there has been no unfair competition and that plaintiff is not entitled to recover.

Counsel will submit decree.

This the 24th day of October, 1955.

WILSON WARLICK,
United States District Judge for the Western District of North Carolina.

Federal Rules of Civil Procedure

Rule 52. Findings by the Court.

(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

(b) *Amendment.* Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

No. 7135

Office - Supreme Court, U.S.
FILED
JUL 13 1956
JOHN T. FEY, Clerk

APPENDIX OF APPELLANT

In the
UNITED STATES COURT OF APPEALS
for the Fourth Circuit

No. 7135

DWIGHT S. WILLIAMS CO., INC.
Plaintiff

v.

LYKENS HOSIERY MILLS, INC.
Defendant

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MAR 10 1956
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INDEX TO APPENDIX

	Page
District Court's Opinion	1
Judgment	9
Excerpts from Testimony	10
Robert D. Williams	12
Gordon H. Reifsnider	43
Charles H. Trotter	50
Ira Lipton	61
Exhibits (Trade-Mark Registrations nos. T.M. 524,743; T.M. 584,507; T.M. 600,543; T.M. 602,189)	73

In the
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Defendant

APPENDIX

DISTRICT COURT'S OPINION

FINDINGS AND CONCLUSIONS

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WILSON WARLICK, District Judge

This is an action for unfair competition and infringement

filed in the Charlotte Division of this District, and heard by the court without a jury on oral evidence, stipulations and other provided means. The hearing brought out facts as follows:

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pears on the exhibits being attached to the complaint filed in the action,—one dated May 2, 1950, for Registration No. 524,743, and another dated January 12, 1954 for Registration No. 584,507, each showing a train as the design. That these designs are stamped on a transparent cellophane wrapper by a process now available and are used as decorative wrappers on the packaged socks. That each such package holds three pairs of men's work socks.

That on January 4, 1955, and during the pendency of this action, plaintiff registered in the Patent Office under No. 600,543, this trademark: "Sock Line of the Nation" and on February 15, 1955, under Registration No. 602,189, plaintiff secured "The Railroad Sock" as a trademark. Approximately 20% of the plaintiff's business is derived from the sale of the "Railroad Sock".

The wrapper in which plaintiff markets its "Railroad" work socks and from which the alleged unfair competition and infringement comes about by the marketing process of the defendant is approximately eleven inches long and five inches wide,—is made of transparent cellophane and by a process of lamination in conjunction with printing, the following is stamped thereon: A picture of a railroad train of the vintage of one hundred years ago, the engine being much alike in appearance to the "General" now kept in the passenger station of the L & N Railroad in Chattanooga or the "Texas" which is preserved for posterity in Grant Park in Atlanta. It is a replica of a wood burner with large stack and has coupled to it two passenger coaches of the type used in that far off day. The engine and the coaches are painted black, red and green. The smoke coming from the stack is in red and as it flows from the engine and over the tender and coaches, has the word "Railroad Sock" printed in white

letters on it. Immediately under that is "Registered U. S. Pat. Office". On a green background, in white letters surrounded by a red border and placed under the engine and coaches will be found these words: "Guaranteed a full month's wear in every pair." "Nylon Heel and toe reinforced". In front of the engine this appears: "3 pair" the figure three being in white with green background and the word pair being printed in red. At the seam on the side of the wrapper are these words in red, bordered with black: "Sock Line of the Nation". At the top and bottom of the cellophane wrapper one sees black lines running more or less horizontally. On both the front and the back of the wrapper will be found a genuine facsimile in appearance of the registered trademarks of the following railroads: New York Central System, Nickel Plate Road, New York, New Haven and Hartford Railroad, Burlington Route, Northern Pacific, Illinois Central, the Seaboard Airline Railroad, Reading Lines, Southern Serves the South, The Great Northern Railway, Cotton Belt Route, L & N, Boston & Maine, Wabash and Santa Fe line. All of which the plaintiff secured the right to use by authority of each individual railroad company. On the back of the wrapper again appears "The Railroad Sock". This unquestionably constitutes a unique package, exceptionally attractive, and one that would be unusually easy to retain in the mind. Plaintiff has expended considerable monies through the years in advertising the sale of its socks.

This is the wrapper that the defendant is charged with infringing by its use of a package wrapper in the sale of its manufactured products.

The defendant in more recent years and particularly since marketing conditions have radically changed, has used

different trade labels and packages in the sale of its various manufactured products and has advertised its goods for sale under some five or six of their different labelled trade names. Sometime during 1953 it began the marketing of its men's anklets and work hose in a transparent cellophane package with the following markings thereon: The word "Lykens" in white letters on a red oval background. In red letters on a white background these words are found: "Men's Anklets". In white letters on a red background "3 pair" appears. Under that is a present day streamline passenger engine with the cars attached as far as the design appears. On the front of the engine where ordinarily the railroad name or number appears, the letter "L" is found and in some of the allegedly infringed wrappers the word "Lykens" appears in place of the "L". This train is painted white and black. Thereunder these statements are found: "Union Made. Nylon Reinforced Heel and Toe. 100% combed cotton. Laundry Tested." "Size". "Color". On the back of the wrapper the word "Lykens" appears followed by the word "Trainman" and a small picture of the streamline likewise is shown identically as that shown on the front of the wrapper.

The above recitation accurately describes the alleged infringing wrapper in which the defendant markets three pairs of its anklets or work hose and is that product which is charged with the infringement and unfair competition as alleged in the complaint. This wrapper is attached to these findings and made a part thereof.

The defendant has advertised these socks rather extensively since 1953 as it has done in the sale of all of its products and has evidently expended considerable monies in its efforts to successfully place them on the market.

Among other things plaintiff contends that the word "Trainman" and "Railroad" have the same significance and that defendant's use of the word "Trainman" and the pictural illustration of a train constitute a colorable imitation of the plaintiff's "Railroad" trademark; and is so similar as likely to cause confusion or mistake and to deceive a purchaser as to the source and origin of the product, and that such infringement of plaintiff's trademark constitutes unfair competition which entitles plaintiff to the injunctive relief sought and the damage later to be determined. Plaintiff does not contend that the defendant's wrapper is a copy of plaintiff's trademark, but does contend that it is a colorable imitation thereof.

The defendant contends that there is no similarity in the wrapper used. That it had no knowledge of plaintiff's wrapper and that it adopted the word "Trainman" as a good suggestion in the sale of its work socks through repeated conversations with various employees of railroad companies in the Lykens, Pennsylvania area. That its modern streamline train could in no wise be confused with the woodburner used by the plaintiff in the marketing of its socks.

Much has been written as to the law in matters of this kind but little it seems could be gained from an assembling of the various authorities that are cited and the law that is contended as being applicable. The term trademark includes any word, name, symbol, or device or any combination thereof adopted and used by a manufacturer or merchant to identify his goods and distinguish them from those manufactured or sold by others. Trademark Act of 1946, Sec. 45, 15 U. S. C. A. 1127.

"The proper function of a trademark is that by asso-

ciation with goods it becomes a means of identification of the origin or ownership of the article and hence a symbol of good will. This essential element is the same both in trademark cases and in cases of unfair competition unaccompanied with trademark infringement. The law of trademarks is but a part of the law of unfair competition. *Hanover Star Milling Co.* v. *Metcalf*, 240 U. S. 403, 413, 36 S. Ct. 357, 60 L. Ed. 713; *Walgreen Drug Stores* v. *Obear-Nestor Glass Co.*, 8 Cir., 113 F. 2d 956, 961; *F. W. Fitch Co.* v. *Camille, Inc.*, 8 Cir. 106 F. 2d 635."

Since no evidence of probative value was offered of actual instances of confusion in the purchase of these goods, the test comes to that of deceptive similarity, and this is whether

> "ordinary purchasers, buying under the usual conditions in the trade and exercising ordinary care, would likely be induced to purchase the article to which the accused trademark is affixed, believing it to be the plaintiff's article. *Queen Mfg. Co.* v. *Isaac Ginsberg & Bros., Inc.*, 8 Cir. 25 F. 2d 284, 287; *S. S. Kresge Co.* v. *Winget Kickernick Co.*, 8 Cir., 96 F. 2d 978, 987. *Seven Up Co.* v. *Cheer Up Sales Co.*, 148 F. 2d 909."
>
> "It is the generally accepted rule that a designation is confusingly similar to a trademark if an ordinary prospective purchaser, exercising due care in the circumstances, is likely to regard it as coming from the same source as the trademarked article. *Schneider Brewing Co.* v. *Century Distilling Co.*; *Victor American Fuel Co.* v. *Huerfano Agency Co.*, D.C., 15 F. 2d 578. *Azrick et al* v. *Rockmont Envelope Co.*, 155 F. 2d 568."

The test finally comes to this: Whether the similitude in the labels would properly deceive a purchaser who exercised ordinary prudence, not the careless buyer who makes no examination. *Ph Schneider Brewing Co.* v. *Century Distilling Co.* 107 F. 2d 699.

After a careful and painstaking study of the label, the contents, markings, get up and the over all appearance of each, I come up with the conclusion that there is no similarity in the two labels and that no confusion would likely result to a purchaser who would exercise ordinary care and prudence, since each is so vastly different from the other. In fact it is inconceivable to me that one desiring to purchase work socks would be deceived in favor of defendant's "Trainman Socks" as packaged over against the "Railroad Sock" of the plaintiff. I therefore am of the opinion that the trademarks are wholly unalike and that there is no likelihood of confusion; that there is no infringement of plaintiff's marks and that the plaintiff is not entitled to enjoin defendant from the use of its wrapper. That there has been no unfair competition and that plaintiff is not entitled to recover.

Counsel will submit decree.

This the 24th day of October, 1955.

(s) Wilson Warlick

Wilson Warlick
United States District Judge for the Western District of North Carolina

JUDGMENT

THIS CAUSE COMING ON TO BE HEARD AND BEING HEARD upon the pleadings and exhibits thereto, the evidence and exhibits at the trial of this cause on February 14, 1955 and on briefs and arguments of Counsel and on further oral arguments of Counsel on October 11, 1955.

And the Court having made Findings of Fact and Conclusions of Law in this cause as appear in the record.

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

(1) That the Plaintiff has not sustained either the First Cause of Action or Second Cause of Action alleged in the Complaint.

(2) That the Defendant has not engaged in unfair competition with the Plaintiff in any manner or respect.

(3) That there has been no infringement by the Defendant of the trade-marks used by the Defendant in commerce among the several states of the United States or intrastate.

(4) That the Complaint in this cause be and the same is hereby dismissed.

(5) That the Plaintiff be and hereby is taxed with the costs of this action.

This 28 day of October, 1955 at Charlotte, North Carolina.

/s/ Wilson Warlick

Wilson Warlick,
United States District Judge

Docketed October 31, 1955

(tr. 4) THE COURT: I believe this case is the *Dwight Williams Company* v. *Lykens Hosiery Mills*, is it not?

MR. BELL: Yes, your Honor.

THE COURT: Are you ready?

MR. BELL: We are ready, yes sir.

MR. FAIRLEY: Yes sir.

THE COURT: Has the patent ever been passed on—its validity determined?

MR. BELL: Your Honor, it has been involved in some other proceedings. This is a trade mark—

THE COURT: It is a trade mark rather than a patent case?

MR. BELL: Yes sir.

THE COURT: All right, sir.

MR. BELL: The action is based on a claim of both trade mark infringement and a claim of unfair competition. Of course, the basis of the unfair competition claim is the intent to deceive the purchasing public and to palm off goods of another.

* * * * *

(tr. 10) MR. BELL: Very briefly, your Honor, what we intend to prove here today is, first of all, that the plaintiff has acquired a very definite and valuable property right, both in the trade-mark, the design the Railroad Socks, the design of a train, and the general railroad theme and its dress and package. We will prove the adoption of that railroad mark at least as early as 1913 by the plaintiff's predecessor. We will prove continued use. We will prove that large sales and advertising money have been spent in that mark, and consequently good will has been made and a very high reputation has been built around the mark.

We will also show in 1913 the plaintiff's predecessor obtained a copyright for the railroad label. At that time those copyrights were issued by the Patent Office and were a little bit more like a trade-mark registration today.

We will also show that they have several registrations. (tr. 11) They use the word "The Railroad Sock." They used it alone and with the design of the train. They also use the trademark "sock line of the nation", and they used an over-all train theme.

THE COURT: All right. Let us get the evidence. We can get your contentions from the evidence.

MR. BELL: All right, sir.

* * * * *

MR. FAIRLEY: We contend, your Honor, that there is not any valid registration of the trade-mark by the plaintiff. We contend that the plaintiff, while it filed two registrations, the first one he filed showed an old-timey, hay burner type train with a big stack, and it had the name "Railroad Sock" in the smoke coming up from it. Then the second one that they filed shows a modern train—excuse me. The first one

showed a modern train—not a streamlined train, but a modern train—with the name in the smoke. The second one shows an old hay-burner type train without anything at all about any words.

We contend that even if the first one, if they had anything in the first one, they filed the second one, and that (tr. 12) constituted an abandonment of the first one, and what they are using now is the old train with the name the Railroad Sock printed underneath.

THE COURT: All right, sir.

MR. FAIRLEY: We contend, too, that our name "Trainman" is not anything like the name, "The Railroad Sock", and we use a modern streamlined train. We claim that trains are used in many other types of merchandise, such as overalls, shoes, and several other brands of socks.

THE COURT: Let us get the evidence in, and then we will know what we are doing.

* * * * *

(tr. 15)

ROBERT D. WILLIAMS,

a witness called by and on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BELL:

(tr. 16) Q. Please state your full name, age and occupation.

A. I am Robert D. Williams. I am 48 years of age. I am

President of the Dwight S. Williams Company, of New York.

Q. In what business is the Dwight S. Williams Company, Inc., engaged?

A. They are in the business of trading in hosiery in their own right and as commission agents for mills, and for doing a general merchandising business in the hosiery field.

Q. To whom do you sell your hosiery?

A. Our hosiery is sold to the wholesale distributors, who, in turn, sell to retail stores, and to the national chain stores.

Q. Do you do any retail business?

A. We do not.

Q. Do you also manufacture any hosiery?

A. No, we do not.

Q. Then you are just a sales agency; is that correct?

A. Just a sales agency.

Q. Do you sell hosiery under brand names or trade-marks which are owned by you?

A. Yes, we do.

Q. Do you sell socks under the trade-mark of Railroad?

A. We sell socks under the name of the Railroad Socks. We sell it at various ways. We sell it with the railroad and an engine. We sell it with just the Railroad Sock.

(tr. 17) Q. Do you use it with a representation of a train?

A. Yes. The name Railroad Sock with the representation of a train is our brand.

Q. What type of socks do you sell under the Railroad trade-mark?

A. It is a high-class work sock.

Q. What type of people use those, usually?
A. Generally used by the working people.

Q. All classes of working people, or a specific group?
A. All classes of working people. No, no specific groups.

Q. I have here a list of 70 names and addresses. (Handing to witness.) Will you tell me what this is?

A. This is a list that I compiled in January of the various people throughout the United States who are handling the Railroad socks for us.

Q. They are your distributors?
A. They are our distributors.

MR. BELL: I would like to offer that list in evidence as Plaintiff's Exhibit No. 8.

(PLAINTIFF'S EXHIBIT NO. 8 is filed.)

Q. Do you know to whom the distributors sell these Railroad Socks?

A. They sell the Railroad socks to most any retail outlet which handles work clothing—Army Stores, basement (tr. 18) department, and big department stores, and so forth.

Q. Who is your distributor in this area?
A. Morris Johnson, Winston-Salem, North Carolina.

Q. Do you know who their principal retailer is?

A. They sell between 200 and 250 of the Belk stores, who have a chain of approximately 300 stores.

Q. Do you have any Federal registration of the Railroad mark?

A. Yes, we have a Federal registration of the Railroad mark, which was the railroad mark with a train. We also have the train alone, and we have applied for the mark of the Railroad Sock alone. And according to what our attorneys tell us this should issue some time this month.

Q. I show you Registration No. 524743. Tell me what that is.

A. Yes. This is a registration that was issued to us on the Railroad sock with the picture of a train.

MR. BELL: I offer that in evidence as Plaintiff's Exhibit No. 9.

(PLAINTIFF'S EXHIBIT NO. 9 is filed.)

Q. MR. BELL: Do you have a copy of that?

MR. FAIRLEY: That is the first registration?

MR. BELL: That is the first one, yes sir.

Q. (By Mr. Bell) I show you Registration No. 584507. Will you identify that, please?

(tr. 19) A. Yes sir. This is the registration of the train alone.

MR. BELL: I offer that as Plaintiff's Exhibit No. 10.

(PLAINTIFF'S EXHIBIT NO. 10 is filed.)

Q. Now, I show you the portion of the official Gazette of the United States Patent Office dated November 23, 1954, page 654, and call your attention to the publication there.

* * * * *

A. This is a copy of the application we have made for the words the Railroad Sock alone.

MR. BELL: Your Honor, I might note for the record that this is published by the Patent Office for opposition. If not opposed in 30 days, then registration normally issues.

* * * * *

(tr. 20) First of all, I would like to offer this publication as Plaintiff's Exhibit No. 11.

(PLAINTIFF'S EXHIBIT NO. 11 is filed.)

* * * * *

Q. Mr. Williams, when did you first start to work for this company?

A. I started to work for the Dwight Williams Company in 1931.

Q. Was that the name of the company at that time?

A. No, not at that time. The name of the company was (tr. 21) Steele & Williams, Incorporated.

Q. Did that same company subsequently become Dwight S. Williams?

A. The name was changed to Dwight S. Williams Company, Incorporated, in 1934.

Q. Do you happen to know how Steele & Williams, Incorporated, was formed?

A. Steele & Williams was formed to take over the partnership of Robert P. Steele and Company, which was a partnership, between my father, Mr. Dwight Williams, and Robert P. Steele.

Q. Do you have any records to show just when Steele & Williams, Incorporated, was incorporated?

A. Yes. I believe our Minute Book will show that the company was incorporated in—I believe it was December, 1927.

* * * * *

(tr. 22) THE COURT: Let it be stipulated that this corporation was organized, and being organized, received a charter dated December 23, 1927.

MR. FAIRLEY: Under the name of Steele & Williams, Inc., under the laws of the State of New York.

* * * * *

(tr. 23) MR. FAIRLEY: I think we want a stipulation as to the effective date of the change of name.

MR. BELL: All right, sir. It is stipulated and agreed that Steele & Williams, Inc., changed its name to Dwight S. Williams Company, Incorporated, on the 19th day of January, 1934.

* * * * *

(tr. 24) Q. Did your father continue as President of the Dwight S. Williams Company after the change of the name?

A. He did.

Q. He did.

MR. BELL: I would like to offer one of the registrations which I overlooked a moment ago. This is 600543.

Q. Will you identify that, please?

A. This is the registration of the "Sock Line of the Nation" which was issued to us January, 1955.

MR. BELL: I offer that as Plaintiff's Exhibit No. 13—

MR. FAIRLEY: I object to that, your Honor, because that is not involved in this case.

THE COURT: What is the materiality of that—January, 1955?

MR. BELL: Your Honor, we deem that very material. (tr. 25) That is one of the many uses of the over-all train theme which we use in connection with the trade-mark. It goes to the over-all theme of railroad and train mark which we use to identify our goods and which we claim has been infringed.

THE COURT: Let me see that, Mr. Fairley.

MR. FAIRLEY: Your Honor, we contend that the status of these things would be determined so far as the plaintiff is concerned as of the commencement of the suit, which was March of last year.

MR. BELL: That registration, your Honor, was issued subsequent to commencement of this suit but the mark was used prior to that time, and part of this suit— in fact, a very large part of it—is the unfair competition claim. And we intend to prove that we have used this railroad-train theme and it has been identified in the public's mind as belonging to us, and that purchasers buy these socks because of the identity of the train and railroad, and that particular slogan goes in with the theme.

THE COURT: I will sustain the objection on the ground that such represents subsequent evidence to the institution of this action and to the filing of all of the pleadings.

MR. BELL: Will you mark that for identification, please ma'am?

(tr. 26) THE COURT: Mark it for identification. Objection by the defendant was sustained.

(PLAINTIFF'S EXHIBIT NO. 13 was marked for identification.)

Q. Mr. Williams, will you please explain the nature of your work with the company when you went to work in 1931?

A. I started out with the company as a sample boy. I worked there for two years and then went out to sell merchandise. In 1943 I became Secretary of the Company, and in 1949 I became President, after my father's death, and have held that position ever since.

Q. Who are the other officers of the Company at the present time?

A. Gordon H. Reifsnider is Secretary, and Vice President, and Margaret L. Kohl is Treasurer.

Q. How long have you known Mr. Reifsnider?

A. About 40 years.

Q. Did you have anything to do with the business or any knowledge of it prior to your going to work in 1931?

A. Well, I was in and out of the office from the time I was a little boy.

Q. It was your father's business?

A. That's right.

Q. Did you have a general idea of what they were doing?

A. We talked and discussed things when I was in school (tr. 27) and college, yes.

Q. To the best of your knowledge, when was the Railroad trade-mark first adopted and used?

A. It was long before my memory, really.

MR. FAIRLEY: Object, your Honor, if he doesn't know.

THE COURT: Overruled. It would be competent for him to state as far as his memory goes. He says long before that, and I took from that he has known of it since he was given memory.

THE WITNESS: As long as I can remember, it has been used.

Q. Will you state of your own knowledge whether or not the Railroad mark has been used continuously since 1931, when you first went to work for Steele & Williams, Inc.

A. It has been in continuous use since I started to work for Steele & Williams Company.

Q. How about during the war?

A. During the war we didn't use it to any extent because the mill was practically 100 per cent on Government work.

Q. But otherwise it has been used?

A. We have been using it constantly.

Q. Do you know whether Robert P. Steele & Company ever attempted to register this mark?

A. We have a copyright on the Railroad Sock. We had (tr. 28) the original in our office, but it seems to have disappeared. We can't find it.

Q. I hand you two certified papers from the Library of Congress and ask you if these are copies of that copyright certificate and label to which you have just referred.

A. Yes, they are.

MR. BELL: I would like to offer these copies as Plaintiff's Exhibit 16, the copy of the certificate of copyright, and 17 the certified copy of the copyright label.

* * * * *

(tr. 29) (PLAINTIFF'S EXHIBITS NOS. 16 & 17 filed.)

Q. (By Mr. Bell) Mr. Williams, do you know why the Railroad trade-mark wasn't registered earlier?

A. The only reason I could think of was probably my father and Mr. Steele thought that a copyright was sufficient. When I came into the picture—

MR. FAIRLEY: Excuse me, Mr. Williams. Objection to what his father thought and said.

THE COURT: Sustained. I do not think he would be in a position to say, unless he was present at the time and knew why. Otherwise, it would be hearsay evidence.

Q. You do have knowledge of the registration, though, when you came into the picture. Can you tell us what you did to protect these marks?

A. When I came into the picture, we immediately put these through the patent office to protect ourselves, and since that date we have tried to police the names that we (tr. 30) own to the best of our ability.

Q. You say "police" them. Do you have any specific instances of such policing?

A. Yes. We had a case with the Regal Company in New York in which they were using, making use of the design of a train and the word "cracker" to go along with it in connection with work clothes.

MR. FAIRLEY: The word of what, Mr. Williams?

THE WITNESS: Cracker. Cracker. C-r-a-c-k-e-r.

Q. Mr. Williams, I show you a certified copy of a Decision from the Examiner of Interferences in Opposition No. 30,906, *Dwight S. Williams Company, Incorporated*, v. *Riegel Textile Corporation*. Do you recognize that?

A. Yes sir. This is the report sent to us by the Patent Office from the Examiner of Interferences.

Q. Do I understand that you oppose the registration of the word "cracker" and the design of the train?

A. We did.

Q. What was the outcome of that opposition?

A. The Examiner upheld us.

Q. And denied the registration?

A. And denied the registration.

MR. FAIRLEY: Your Honor, we object to that on the ground and to this extent: On the ground that it happened in a matter involving some gloves is not binding on this (tr. 31) Court and is not the same matter we are concerned with here.

MR. BELL: Your Honor, this is offered, not as any rule binding this Court at all. It is offered to show that we have been diligent in protecting the Railroad mark to prevent infringers from copying our goods.

THE COURT: I will permit the evidence for the purpose of corroborating the witness with respect to the desire of the plaintiff to protect any interest it might have in the trade-mark or copyright.

MR. BELL: This is offered as Plaintiff's Exhibit No. 18.

(PLAINTIFF'S EXHIBIT NO. 18 is filed.)

THE COURT: That is for corroborating.

Q. (By Mr. Bell) Mr. Williams, have you always used the Railroad mark as is shown on this copyright label?

A. No.

Q. Exhibit 17.

A. No. We used it that way and in other ways.

Q. I show you some riders and labels on a board and ask if you will tell us what those show.

A. Those are the Railroad Sock labels, riders and bands that we have used in the Railroad Sock for practically—I don't know how many years. They were printed originally by the David Wild Company, lithographers.

Q. You are not using those presently?

(tr. 32) A. No sir.

Q. Where did you obtain those labels?

A. We had those in our Sample Department. We carried them there to be shipped to the various people who manufactured them from time to time.

MR. BELL: I offer this in evidence as Plaintiff's Exhibit No. 19, to show the early use of the Railroad Sock.

THE COURT: All right, sir.

(PLAINTIFF'S EXHIBIT NO. 19 is filed.)

Q. (By Mr. Bell) I show you some other bands, labels and riders and ask you what do they show.

A. They show the present set-up we are using on the Railroad Sock with the train and the name of The Railroad Sock.

MR. BELL: I offer those in evidence as Plaintiff's Exhibit No. 20.

(PLAINTIFF'S EXHIBIT NO. 20 is filed.)

Q. (By Mr. Bell) Now, I show you what appears to be a paper wrapper. Will you tell us what that is?

A. This is part of a ream of paper that we have been using to cover the boxes in which we ship the merchandise to our customers.

MR. BELL: I offer that in evidence as Plaintiff's Exhibit No. 21.

(PLAINTIFF'S EXHIBIT NO. 21 is filed.)

(tr. 33) Q. (By Mr. Bell) How are the majority of these Railroad Socks packaged today?

A. Most of them are packaged in a transparent cellophane or otherwise paper. Three pairs to the package.

Q. Is this such a package?

A. That is a package of our Railroad Socks, yes sir.

Q. Do you see any other mark on that package that you use?

A. Yes. The Sock Line of the Nation.

Q. Where does that appear on the package?

A. On the side.

Q. Can you tell us how long you have used that mark?

A. Since we started to use the trade-mark set-up, in 1950.

Q. The trade-mark set-up?

A. I mean, this paper set-up.

Q. This particular design?

A. That's right. On the package.

MR. BELL: I would like to offer this in evidence as Plaintiff's Exhibit No. 22.

(PLAINTIFF'S EXHIBIT NO. 22 is filed.)

Q. I show you a transparent wrapper. Can you tell me what this is?

A. That's the transparent wrapper that we buy in rolls and which we package the hosiery with on our packaging (tr. 34) machine.

Q. Is that wrapper used to make the package of Exhibit No. 22?

A. Yes sir.

MR. BELL: I offer that in evidence as Plaintiff's Exhibit No. 23.

(PLAINTIFF'S EXHIBIT NO. 23 is filed.)

Q. I show you what appears to be a fold-up box or carton and ask you what it is.

A. This is the carton that we use to package a dozen socks and which we ship in a larger carton to the customers.

Q. How many packages does this carton hold?

A. We put four packages in the cartons.

Q. That is a dozen socks?

A. That is a dozen socks.

MR. BELL: I offer this in evidence as Plaintiff's Exhibit No. 24.

(PLAINTIFF'S EXHIBIT NO. 24 is filed.)

Q. (By Mr. Bell) Mr. Williams, I notice on these Exhibits 21 and 22 and 23 and 24 various other insignia. Can you tell me what these are?

A. Those are the insignia from various railroads throughout the country.

THE COURT: Let me see one of them, please, so I can (tr. 35) keep up with your question.

THE WITNESS: We wrote to the various railroad companies and asked them for the permission to use their insignias on our package because we felt that this would be a good aid in carrying through the Railroad Sock and the theme, the whole theme on the story, and they have granted us permission to use these insignias.

Q. You say the purpose was what?

A. To carry through a complete theme on the Railroad Sock.

Q. Do you use that theme in your advertising and sales?

A. Yes sir, we do.

Q. How long have you been using these various other railroad or train insignia?

A. Since 1950.

Q. Mr. Williams, who manufactures the Railroad Socks for you?

A. The William G. Leininger Knitting Company. Mohrton, Pennsylvania.

Q. Do they make these Railroad Socks to your specification?

A. Yes sir, they do.

Q. How do you specify the quality?

A. We specify the material, the type of yarn we want in the socks, and the weight.

(tr. 36) Q. Does this mill make socks under the Railroad trade-mark for anyone else?

A. No sir.

Q. How are these Railroad Socks delivered to your distributors?

A. They are delivered in 30-dozen cartons and up, and packed in the Railroad packing.

Q. I see. You said that your company sells the socks?

A. We get the order from the customer and send it to the mill, who, in turn, ship it to the customer.

Q. They ship direct?

A. They ship direct.

Q. On your order?

A. That is right.

Q. Do you have any agreement with the mill with respect to the manufacturing, packaging and shipping of these Railroad Socks?

A. Yes sir, we do.

Q. What is the nature of that agreement?

A. It is more of a verbal agreement with the mill that they will consistently manufacture these socks to our specification and not for anyone else.

Q. When did this particular mill, W. G. Leininger Company, start making the Railroad Socks for you?

A. I believe it was in 1938 or 1939. Somewhere in there.

(tr. 37) Q. Who manufactured them for you prior to that?

A. Prior to Leininger, the Rose Glen Knitting Company of Sumter, South Carolina, made the socks for us, and prior to them, the Franklin Hosiery Mills at Chambersburg, Pennsylvania.

Q. Did Rose Glen and Franklin also make them to your specification?

A. They did.

Q. Why did you change from those mills to the W. G. Leininger?

A. Well, the Franklin Hosiery Mill went out of business, and the Rose Glen Hosiery Mills were taken over by the Benal Hosiery Company of New York, and they subsequently were taken out of the work sock business entirely.

Q. Can you give us any idea as to the amount of sales of the Railroad Socks you have made over the last few years?

A. We have sold approximately a million dozen socks.

Q. Did you make up a list of those sales?

A. I did.

Q. Is this such a list? (Handing list to witness.)

A. It is.

Q. Where did that list come from?

A. This came from our books on the shipping slips that were sent to us by the factory.

Q. You compiled it from your records?

(tr. 38) A. That's right.

Q. Will you please refer to that list and tell us how many thousand dozens were sold during the various years listed.

A. 1951, 115,000. 1952, 217,000. 1953, 279,000. 1954, 326,000.

Q. And that total over the last four years.
A. Is 937,000 dozen.

Q. That is Railroad Socks alone?
A. Railroad socks alone.

Q. Have you advertised the Railroad Socks, and if so, can you tell me how much you have spent in the advertising for the last few years.
A. We made a compilation.

Q. Is that also shown on this list?
A. That's right. We have spent $42,037.50 on advertising alone.

MR. BELL: We will mark this as Plaintiff's Exhibit No. 25 and offer this list of advertising figures and sales figures.

(PLAINTIFF'S EXHIBIT NO. 25 is filed.)

Q. (By Mr. Bell) Do you make and supply counter and floor display racks to your distributors?
A. We do.

Q. Do these figures listed here for advertising costs, (tr. 39) include the cost of those display racks?
A. No, they do not.

Q. Am I correct in my understanding that you also sell socks other than the Railroad Socks?
A. Yes. Yes, we do. We have a complete line.

Q. What place in your business, what percentage of your business does your Railroad business constitute?
A. As of to date, the Railroad Sock is about 20 per cent of our business, but that may seem like a small part of it, but it is actually a staple article and it's like an anchor to the wind. It's something that is consistently growing and has

quite a reputation we have built for our firm.

Q. Did the advertising figures stated, Exhibit 25, include advertising for any of these other brands?

A. No sir.

Q. That is Railroad Socks alone?

A. That is right.

Q. How do you advertise these socks? What medium?

A. We advertise in the Hosiery and Underwear Review, Daily News Record, the Merchants Trade Journal, industrial stores magazines, and there are certain ads that we have had in local papers where the distributors are located.

Q. Do you give advertising materials to your distributors?

A. Yes, we do.

Q. I have here a number of different samples, and I (tr. 40) would like for you to look at these and show them to the Court and tell us if those are samples of the various ways in which you advertise the Railroad mark.

A. That's right. These are samples of the various counter displays, etc.

MR. BELL: Your Honor, we want to show the Court the wide-spread variation of use. To avoid cluttering up the record, we would like to put those all in one envelope and offer them as a single exhibit, but we believe it is material to show the various different ways that we display and advertise the Railroad mark and the Railroad theme.

THE COURT: All right. Let it all be offered as one offering, which includes some thirteen different ways and means of advertising used by the plaintiff in getting its Railroad Socks before the public. All right, sir.

(PLAINTIFF'S EXHIBIT NO. 26 is filed.)

MR. BELL: I would like to note one or two from this exhibit.

Q. What is this, Mr. Williams?
A. These are salesmen's sample kits we distribute to the various wholesalers for their salesmen.

Q. And this?
A. That's part of the front page on the Hosiery & Underwear Review that we used last season.

THE COURT: (To the witness) The rest of that ap-
(tr. 41) pears to be advertising media you use throughout the trade journals and newspapers?

THE WITNESS: Yes sir.

MR. BELL: That was marked 26.

Q. Now, I show you another sheet containing some advertising matter and ask you to tell me what you see at the top of that sheet.
A. This is a card that we had sent out to our wholesalers, which was to be distributed to their customers in order to help promote the sale of the Railroad Socks.

Q. Will you read the underlined portion of that card, the part that is underlined in red.
A. It states (Reading) "Future ads will contain similar illustrations with the happy little Engineer. We hope he'll 'engineer' business your way!"

Q. What is the purpose of that last about "the happy little Engineer"?
A. That's part of the Railroad theme we are building up,

to carry the whole thing through that way. We are helping the customer to build his business.

Q. What do you see on the lower portion of that card?

A. This is replica of the front of the Hosiery & Underwear Review for this past year.

Q. That also shows the Railroad theme?

A. The whole Railroad theme, and what we are trying to (tr. 42) do.

MR. BELL: I would like to offer that as Exhibit No. 27.

THE COURT: All right, sir.

(PLAINTIFF'S EXHIBIT NO. 27 is filed.)

Q. Mr. Williams, do you have any knowledge as to when the defendant, Lykens Hosiery Mills, began using the word "trainman"?

A. Yes sir.

Q. When was that?

A. The January show, the work clothing show at the Hotel New Yorker, about the 6th of January, 1954.

Q. Did they have any kind of display at that show?

A. They certainly did.

Q. Does this program have to do with that work clothes and sportswear show that you mentioned?

A. Yes sir. This is a program that I picked up in the Hotel New Yorker in January of 1954.

Q. I call your attention to page 28 of that program and ask what you see there.

A. This is an ad by the Lykens Hosiery Mills which states that they are introducing the Trainman Sock.

Q. Will you show that to the Court, please?

(Witness hands program to the Court.)

THE COURT: All right, sir.

(tr. 43) MR. BELL: We might note here for the record, your Honor, that this refers to the date which is in the bill of complaint. I offer that as Exhibit 28.

THE COURT: This is the Work Clothes and Sportswear Show dated Sunday, January 3 to Wednesday, January 6, 1954, Hotel New Yorker, with particular emphasis on page 28.

(PLAINTIFF'S EXHIBIT NO. 28 is filed.)

MR. BELL: We might note at this time, your Honor, that Plaintiff's Exhibit No. 3, which was attached to the bill of complaint, is a letter of notification to Lykens Hosiery Mills, and that letter was dated January 7th, and then in the answer Lykens admitted that they received it. That was only three days after the opening of this show. We gave them prompt notification.

Q. (By Mr. Bell) Mr. Williams, do you have any other evidence of the advertising of the sale of the Trainman Socks by Lykens Hosiery Mills?

A. They advertised in the Work clothing show in the summer of 1954, and also in January of 1955.

Q. I show you another program and ask you to identify that.

A. Yes. This is the program from June 20 to 23, 1954.

Q. I call your attention to the back cover of that program and ask you if you will to read the top of that and then also

read a little bit of this fine print here.

(tr. 44) A. This states: (Reading) "Trainman smashes sales records. Lykens Trainman Work Socks. The guaranteed work socks in the 'poly' bag are setting new records for fast turnover and high profits all over the country. They're the only work socks with a national reputation!"

Q. That's enough. "The only work socks with a national reputation." That's what they say on that ad?

A. Yes sir.

MR. FAIRLEY: He didn't read all of it, your Honor.

Q. You may read it all.

A. (Reading) "100% combed cotton, with nylon reinforced heel and toe! Half hose and anklets, 10 to 13, in white and six colors."

Q. All right, sir.

MR. BELL: I would like to show that to the Court, and we will offer that program as Plaintiff's Exhibit No. 29.

(PLAINTIFF'S EXHIBIT NO. 29 is filed.)

THE COURT: Go ahead.

Q. I show you another program. Will you identify that?

A. This is the program from the '55 work show.

Q. I call your attention to the inside back cover. Will you tell me what it shows there?

A. This is a repetition of the Lykens advertising of the Trainman Socks.

(tr. 45) Q. Does it show an illustration of the train?

A. Yes sir. On the package there is a picture which is an illustration of the train.

Q. The date of that is January, 1955?
A. January 2nd to January 5, 1955.

Q. It is after the commencement of this suit?
A. That's right.

Q. Does it say anything about the sales?
A. It says (reading) "Trainman smashes sales records."

MR. BELL: I will introduce this program as Plaintiff's Exhibit No. 30.

THE COURT: All right, sir. That is a subsequent program, comparable to this and the other, I imagine.

MR. BELL: Yes sir.

(PLAINTIFF'S EXHIBIT NO. 30 is filed.)

Q. Do you know of any other instances of the use or advertising of the name "Trainman" by Lykens?

A. Well, I believe it has appeared in the Hosiery Industry Weekly, and it has also appeared in the Army and Navy papers on the coast, and there was an advertisment—or several advertisements—in the Work Clothing Show held in Los Angeles.

Q. I show you several copies of advertising material and news material and ask you if these are samples of the advertisements to which you refer? Will you also show those to (tr. 46) the Court?

A. Yes. These are the advertising to which I have referred to.

MR. FAIRLEY: We have no objection to these, Mr.

Bell, but we would like to see them before you introduce them.

THE COURT: You might stipulate those. It might make the record less full that way.

MR. BELL: We propose to offer all of those as a single exhibit, as 31, in order to cut down on the bulk.

THE COURT: All of these papers, they are all alleged evidences of advertising on the part of the defendant, Lykens, is that right?

MR. BELL: That is correct, sir.

THE COURT: I imagine you gentlemen can stipulate all that without any difficulty.

MR. BELL: The only reason this letter was in there, we want to identify when that particular ad was received.

MR. FAIRLEY: We object to the letter, your Honor.

MR. BELL: That's all right. I will prove it otherwise.

THE COURT: I imagine the ad will speak for itself.

MR. BELL: This particular ad is not dated, your Honor, and I want to ask you, Mr. Williams—

Q. This ad, making up a part of Exhibit 31, has the name Nat Jolton Company on it. Do you know when you received (tr. 47) that ad?

A. We received that ad last year. I think it was in the early part of the year, probably in May.

Q. That was mailed in 1954?

A. That's right.

Q. I would like for you to read a little of this printed matter right in the center of that ad. That was just three or

four months after the introduction of the Trainman Socks.

A. (Reading) "The sock with a national reputation—three pairs guaranteed three months' wear. America's best cotton work sock, famous from coast to coast, heavyweight two thread cotton, extra heavy nylon heel and toe. Anklet and regular length styles. Colors: white, random, gray, khaki, cordovan and navy. $3.00 a dozen."

Q. Fine. Thank you.

MR. BELL: These will all be as Exhibit No. 31.

(PLAINTIFF'S EXHIBIT NO. 31 is filed.)

Q. Mr. Williams, do you know any other way that Lykens is using the word "Trainman"?

A. Yes. They brought out counter display racks with the name "Trainman" on them, and they have put in a series of counter merchandise with the word "Trainman" on them.

Q. Do they use floor racks also?

A. Yes, they use floor racks.

(tr. 48) Q. I show you a display sign and ask you what that shows.

A. That shows the Lykens Trainman Socks.

Q. How is that used? Do you know?

A. That was put on the back of a wire stand.

Q. Display stand? Floor stand?

A. That's right. Floor stand.

MR. BELL: I offer this as Plaintiff's Exhibit No. 32.

(PLAINTIFF'S EXHIBIT NO. 32 is filed.)

Q. (By Mr. Bell) Mr. Williams, how do they sell their

socks? That is, how are they packaged?

A. They are packaged in a poly-ethylene bag, three pair to the bag.

Q. Are these the type of packages you refer to?

A. Yes sir, they are.

MR. BELL: I offer these in evidence as Plaintiff's Exhibit No. 33, which has a tag on it marked "E".

(PLAINTIFF'S EXHIBIT NO. 33 is filed.)

MR. BELL: Plaintiff's Exhibit No. 34, which has a tag on it marked "G".

(PLAINTIFF'S EXHIBIT NO. 34 is filed.)

MR. BELL: And Plaintiff's Exhibit No. 35, which has a tag on it marked "I".

(PLAINTIFF'S EXHIBIT NO. 35 is filed.)

(tr. 49) THE COURT: That is the same type of advertising on the same name and same type of package?

MR. BELL: Your Honor, those are duplicates that we took the tags off so that they would be unofficial.

THE COURT: I just wanted to see if there was anything there that I do not have here.

MR. BELL: I believe they are identical, except the package of stockings inside. One of these is khaki, and one is gray, and one is white.

THE COURT: It is immaterial, because he said they make six different types or colors.

Q. (By Mr. Bell) Do you know how extensive the Lykens sales of Trainman Socks have been?

A. I don't know how many they have sold, but the area covered has been pretty wide.

Q. Have they covered all over the United States?

A. We have heard from practically every distributor we have had about them.

* * * * *

(tr. 51) Q. Have you had any complaints to you about the sales of Trainman Socks?

* * * * *

(tr. 52) A. Yes sir.

* * * * *

(tr. 54) Q. (By Mr. Bell) Mr. Williams, the defendant has admitted in the answer that it and its predecessors have been engaged in the manufacture of men's work socks (tr. 55) for many years. Do you know under what names they sold their work socks prior to January 4, 1954, when they introduced the Trainman Socks?

A. Yes. They sold their socks under the name of Lykens. Under the name of Lipton. Under the set-up of the Thrift Pack.

Q. Will you identify this sock, please?

A. Yes. That is the Lykens sock with their Lykens trademark or set-up.

MR. BELL: I offer that as Plaintiff's Exhibit No. 40.

(PLAINTIFF'S EXHIBIT NO. 40 is filed.)

Q. (By Mr. Bell) Can you identify this one, please?

A. This is Lykens Socks with his Lipton name.

MR. BELL: That will be offered as Exhibit No. 41.

(PLAINTIFF'S EXHIBIT NO. 41 is filed.)

Q. (By Mr. Bell) I show you one more.
A. This is Lykens Thrift Pack.

MR. BELL: That will be offered as Exhibit 42.

(PLAINTIFF'S EXHIBIT NO. 42 is filed.)

MR. BELL: The purpose of those offerings, your Honor, is to show that the defendant had three trade-marks which it was using and could have been continued at the time they appropriated the plaintiff's mark. We will also show some misrepresentations as to the use of those.

THE COURT: Did the defendant have trade-marks on these that you offer?

(tr. 56) MR. BELL: Sir?

THE COURT: The defendant did have trade-marks?

MR. BELL: I say trade-marks. They are common law trade-marks. The Thrift Pack, Lipton and Lykens show that they did have three marks they could have used other than using ours.

* * * * *

(tr. 66) MR. BELL: That is all of the direct examination by the plaintiff, Mr. Williams.

THE COURT: Any cross-examination, Mr. Fairley?

MR. FAIRLEY: Yes sir.

* * * * *

(tr. 74) Q. (By Mr. Fairley) Mr. Williams, did your company, has your company ever used in its packaging the modern-type train—not a streamlined train, but the modern type—with the name "The Railroad Sock" printed underneath it as is shown on the earlier registration?

A. Not when we started to package the goods, no.

Q. Have you ever used it in your packaging, or in your advertising, the single-stack train and the old-style train picture without any words on it and without the name "The Railroad Sock"?

A. I don't remember. Not in that particular question.

Q. Yes sir.

A. I don't know. Of course, I did state before that we used the railroad train and the words "The Railroad Sock" in various ways. That was in the testimony earlier here, and we haven't been confined to one set-up.

Q. I will ask you if it isn't true that you have never (tr. 75) used the name and the train picture in the same combination, exactly as shown on the earlier registration?

A. I don't understand that question.

Q. On the 1950 registration? Where the train, where the picture of the train appears.

A. Yes.

Q. A modern-type train, but not a streamlined train?

A. Yes.

Q. With smoke above it, and with the name "The Railroad Sock" beneath it?

A. Yes.

Q. And the word "The Railroad Sock" in letters of the

same size. I will ask you if you have ever used exactly that combination of the picture and words and style and size of print either on your package or in connection with your advertising of the Railroad Sock?

A. Certainly we did. This was our original registration. This was the copyright. It is right there in evidence.

Q. Have you got any packages with that on it?

A. No package, no.

Q. None of them have been introduced in evidence, have they?

A. No.

Q. No advertising has been introduced in evidence that is exactly that?

(tr. 76) A. This is the type of merchandise that we used prior to going into this particular set-up here.

Q. You don't have any printed matter?

A. Yes we do.

Q. That's exactly the same thing? Do you?

A. I think so. I think you will find it there.

Q. When did you stop using this, if you did? If you ever used it, when did you stop using it?

A. I don't know the exact date we stopped using it. I've still got several hundred thousands of the bands if you want them.

MR. BELL: Might I note that he is referring to Exhibit 19.

* * * * *

(tr. 84)

GORDON H. REIFSNIDER,

a witness called by and on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BELL:

Q. Will you state your full name, age and occupation.

A. My name is Gordon H. Reifsnider. I am 60 years of age. I am Vice-President of Dwight S. Williams Company, Incorporated.

Q. What is the business of Dwight S. Williams Company?

A. We are a selling agent, selling agency.

(tr. 85) THE COURT: I believe you have been over that, Mr. Bell.

MR. BELL: This is largely corroborative, your Honor.

THE COURT: Yes sir.

MR. BELL: I think we can do it right quickly.

THE COURT: It would not be necessary, because he made no attack on that.

MR. FAIRLEY: We agree they are selling agents for hosiery.

THE WITNESS: We are a selling agency.

Q. (By Mr. Bell) How long have you been engaged in this business, Mr. Reifsnider?

A. Since May 1, 1911.

Q. What was the name of the company at that time?
A. Robert P. Steele Company.

Q. And who were they?
A. And I have been associated with Robert P. Steele Company and their successors ever since.

Q. What was Robert P. Steele & Company?
A. Robert P. Steele & Company was a partnership of Robert P. Steele and Dwight S. Williams.

Q. Was that the partnership you say was subsequently taken over by Dwight S. Williams?
A. That was subsequently, in 1928 or late 1927, or early January, 1928, Steele and Williams incorporated, and the (tr. 86) name was changed in 1934 to our present name, Dwight S. Williams Company, Incorporated.

Q. Were all of these companies engaged in the same type business?
A. That's right.

Q. What were your duties when you first went to work for Robert P. Steele & Company?
A. I was an office boy in charge of the sample room.

Q. That was in 1911?
A. In 1911.

Q. Did you subsequently become a salesman?
A. I became a salesman in 1914.

Q. Do you still sell hosiery?
A. And I am still selling hosiery.

Q. Does Dwight S. Williams Company sell hosiery under the trade-mark "Railroad"?
A. They do.

Q. Do you know when the trade-mark railroad was first

adopted and used?

A. I can't give you the exact date, but I am sure we used the name "Railroad", "The Railroad Sock", in 1912 and 1913.

MR. FAIRLEY: Excuse me. My objection is to the form of the question as to when the trade-mark was first used.

THE COURT: Mr. Williams said it was copy-righted up (tr. 87) until 1950.

MR. BELL: Your Honor, perhaps we will need a little clarification there. It has been a trade-mark all along, but the copy-right act provides for the copy-righting of certain labels and bands. The mark is a trade-mark whether it has ever been registered or not—the minute they first used it to identify their goods in the trade as a matter of law that became their trade-mark.

The registration and the copy-right certificate were just papers issued by the Government in connection with that. But it is a common law trade-mark and would still be so, even if they had no registration today. It is a matter of terminology—the word trade-mark is correct, except the defendant challenges whether or not we have a trade-mark, I understand.

Q. (By Mr. Bell) I believe you said it was first adopted by Robert P. Steele & Company?

A. It was.

Q. Has it been used continuously by it?

A. It has been used continuously by Robert P. Steele & Company and their successors.

Q. I believe you said that you knew that it was used in 1912 and 1913. How do you pin that down?

A. Simply because I went out on the road in 1914 selling, and I sold Railroad Socks, so it must have been used prior (tr. 88) to 1914.

Q. What type of socks do you sell under the Railroad trade-mark?

A. It is a high-class work sock, and for general use of the working man.

Q. To whom do you sell them?

A. We sell them to the wholesale distributors.

Q. What type of stores usually handle these socks?

A. To the best of my knowledge, we see them sold in the Army & Navy Stores, department stores, basement department stores, and general stores handling work clothing.

Q. You do not sell any at retail?

A. We do not sell any goods at retail.

Q. I would like to show you Plaintiff's Exhibit No. 8. That is a list. Can you tell me what that shows?

A. This is a list of Railroad accounts or distributors throughout the United States.

Q. They handle—Today, do they handle your railroad socks?

A. All of the accounts shown on that list handle our Railroad Socks today.

Q. I show you a certified Certificate of a copy-right and copy of a copy-right label which are in evidence as Plaintiff's Exhibits 16 and 17, and ask you what they show.

A. They show the Railroad Socks as we had used it (tr. 89) originally.

Q. Do you remember when you actually used, the time that you actually used the label as shown in Exhibit No. 17?

Did you actually sell socks to your own knowledge with that label on it?

A. Yes, we did.

Q. Do you know when that was?

A. I would say back in 1912 or '13.

Q. I show you some bands, labels and riders which are in evidence as Plaintiff's Exhibit No. 19 and ask you what they show.

A. They were used at a somewhat later date. Just exactly when, I don't know.

Q. That was later, after the label in 16 and 17?

A. That was used after the original kind. That's right.

THE COURT: Let me see 16 and 17, please.

MR. BELL: Your Honor, that's the one that was filed with the certificate of copyright.

THE COURT: Yes. Yes, that is the old train back in that period. There is no doubt about that.

MR. BELL: That is very similar to the one shown here. It isn't identical.

Q. (By Mr. Bell) Now, Mr. Reifsnider, I show you a number of labels, riders, packages, wrappers, which are in evidence as Plaintiff's Exhibits 20 to 24, and I ask you (tr. 90) what these exhibits show.

A. That's the type of packing and label and our transparent package as we are using today.

Q. Do you know how long you have used the particular design as shown in these exhibits 20 to 24?

A. Since 1950.

Q. Since 1950?
A. Yes sir.

Q. Are you familiar with the sales volume of the Railroad Sock?
A. Yes sir, I am.

Q. I show you a list—
A. The list we compiled.

Q. (Continuing)—Which is in evidence as Plaintiff's Exhibit No. 25. Are you familiar with that?
A. Yes, I am. We recently compiled it, and it shows that we have spent approximately $42,000.00.

THE COURT: That is the same evidence as given before?

MR. BELL: Yes sir, that's merely corroborating, your Honor.

THE WITNESS: (Continuing) During the last four years, 1951 through 1954.

Q. And the advertising figures are on that list?
A. That was the advertising.

Q. What about the sales figures?
(tr. 91) A. They are also shown on that sales sheet, and total close to a million dozen.

Q. Do you know when Lykens began using the name Trainman in association with work socks?
A. It came to my knowledge in January, 1954, that the use of the name Trainman was on sale and being displayed at the Hotel New Yorker during the work clothes convention.

Q. January, 1954?
A. January, 1954.

Q. Do you have any knowledge of subsequent use of this word Trainman by Lykens?
A. Yes. They have—it has been prominently displayed in their wire racks merchandising, plus advertising journals, and I have seen the goods actually for sale.

Q. Have you received any complaints from your distributors or others in connection with this?
A. Yes, we have had letters—

MR. FAIRLEY: Objection.

THE COURT: Sustained, except just a yes or no.

THE WITNESS: Yes, we have.

THE COURT: He says they have.

MR. FAIRLEY: I move the portion of the answer be stricken except the answer "yes".

THE COURT: I have ruled that only the "yes" will be competent. He is entitled to state that it has. Of course, (tr. 92) the complaints themselves in order to get into the record will have to be in evidence under the rules of evidence.

Q. (By Mr. Bell) I show you a number of ads and printed matter, which are in evidence as Plaintiff's Exhibit 31. Do these represent the type of advertising of the Trainman Socks to which you refer?
A. They do.

Q. I show you these letters which have been identified as Plaintiff's Exhibits Nos. 37, 38 and 39 and ask you if your company received these three letters.
A. Yes, they did.

MR. BELL: They are not in evidence, your Honor.

THE COURT: That is right.

MR. BELL: That closes direct examination.

THE COURT: Any cross-examination, Mr. Fairley? His evidence is very much in line with the other evidence.

MR. FAIRLEY: No questions, your Honor.

THE COURT: Stand aside. Who next?

MR. BELL: Step down, Mr. Reifsnider.

* * * * *

CHARLES H. TROTTER,

a witness called by and on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

(tr. 93) *BY MR. BELL:*

Q. Mr. Trotter, will you state your name and occupation, please?

A. Charles H. Trotter, Registered Patent Attorney.

* * * * *

(tr. 104) Q. (By Mr. Bell) Mr. Trotter, have you ever purchased any Trainman Socks?

A. Yes, I have.

Q. Tell me—

THE COURT: That is this one here, is it not? That is what you are talking about?

THE WITNESS: Yes, your Honor.

THE COURT: Did you buy grays, or what color did you buy?

THE WITNESS: They are in evidence.

(tr. 105) THE COURT: In evidence. All right.

Q. I show you Trainman Sock, which is in evidence as Exhibit No.—

THE COURT: Would you be willing to stipulate on these exhibits he has offered are of your manufacture and put into legitimate trade and could have been bought by him?

MR. FAIRLEY: Yes sir.

MR. BELL: Your Honor, there are certain other facts in connection with this purchase that we want to bring out.

THE COURT: All right. I thought we might expedite the matter by making that, because they all appear to have come from one source.

THE WITNESS: No. They come from different sources.

THE COURT: No, I mean the same source of manufacture.

THE WITNESS: Oh, yes sir.

THE COURT: You probably bought them from a number of places, I imagine?

THE WITNESS: All over the country.

Q. (By Mr. Bell) Mr. Trotter, I show you these Trainman Socks, which are in evidence as Exhibits 33, 34 and 35

and ask you if you purchased these socks and when and where, please sir.

A. I did. I purchased these socks and put these shipping tags on them at the time. The one which is Exhibit 33 I purchased on April 2nd from Jake's Army & Navy Store in (tr. 106) West Chester, Pennsylvania.

Q. That is April 2, 1954?

A. 1954. The one which is marked "G", I purchased on April 3rd from Robinhood Surplus Store in Merrick, Long Island.

Q. That is Exhibit 34.

A. And the one which is Exhibit 35, I purchased on April 3rd from Shubert's Army & Navy Store in Tarrytown, New York.

Q. How do you identify these socks, Mr. Trotter?

A. As I stated, when I bought them, I put these shipping tags on them and marked them "E", "G" and "I", respectively, here.

Q. Now, I notice you are referring to a memorandum book.

A. Yes.

Q. Did you make notes at the time of the purchase?

A. That's a daily desk diary that I noted down those purchases.

* * * * *

(tr. 107) Q. Mr. Trotter, in your purchase of these Trainman Socks, did you run into any confusion?

A. I run into—I ran into one instance.

MR. FAIRLEY: Objection to the form of the question.

THE COURT: What do you mean by that, Mr. Bell?

MR. BELL: I mean—

Q. In your purchase of these Trainman Socks, were you offered any other socks in lieu thereof, or was there any confusion in—

A. There was in one instance.

Q. (Continuing)—the purchase between these and others?

MR. FAIRLEY: Objection.

A. There was.

THE COURT: Sustained as to the other sock. It was the Railroad Sock.

Q. Mr. Trotter—

(tr. 108) THE COURT: (To the witness) Were you confused about this Trainman Sock against the Railroad Sock? That is what you are asking about, is it not?

THE WITNESS: Yes sir.

MR. BELL: I will rephrase the question.

Q. In your purchase of these Trainman Socks which you have just referred to —Exhibits 33, 34 and 35—did you encounter any confusion between these socks and the Railroad Socks?

A. I did.

Q. Explain the nature of that confusion.

A. That was with reference to Exhibit 35, which I purchased at Shubert's Army & Navy Store in Tarrytown. On

April 3rd I went—Well, before going I had asked for a list of distributors or dealers in Trainman Socks, and I was informed that the Merrick, Long Island, address— Robin Hood Stores handled them—that an Army & Navy Store in Yonkers, New York handled them, and that Shubert's Army & Navy Store in Tarrytown handled them.

I got them in Robin Hood all right. I drove into Yonkers and found that the address I had been given, first, was wrong, and second that the store had gone out of business. It is 12 miles from there up to Tarrytown, and I thought possibly the same thing might be true of the Tarrytown address, so I called up. I looked in the phone book. They (tr. 109) were still in the phone book. I called up and I asked them, "Do you handle Trainman Socks?" They said, "We do." So I drove up.

I went in and asked the clerk, "Do you have the Trainman Socks?" Says, "Yes." I said, "I would like to have a couple of packages of them." She reached up on the shelf and she brought a square box down—

MR. FAIRLEY: Object to what somebody else did, your Honor.

THE COURT: Overruled. Go ahead.

THE WITNESS: She brought down a box of socks which contained four packages of socks in cellophane and handed me two. I said I would take two of them. I started to pay her before I realized that she was handing me Railroad Socks and not Trainman Socks. I said, "That isn't the one I want. I want the Trainman Socks." "That's it. There's the train," she said. I said, "No. There are two brands on the market."

MR. FAIRLEY: I object, your Honor.

THE COURT: That would not be competent, gentlemen.

MR. FAIRLEY: I move to strike the answer.

THE COURT: That would not be competent.

MR. Bell: He can testify the facts that happened in his presence, your Honor. That they tried to give him Railroad Socks instead of Trainman Socks.

(tr. 110) THE COURT: He can testify to the fact that he made inquiry for Trainman Socks and they gave him Railroad Socks. He would not be able to testify to a conversation. That would all be in the absence of the defendant.

Q. (By Mr. Bell) What happened after that?

A. After that she called the Manager and said, "Do we have a sock called Trainman other than this one?" And he says, "Yes."

MR. FAIRLEY: Objection.

THE WITNESS: (Continuing) And he reached up—

THE COURT: That would not be competent.

Q. Did she find the Trainman Socks?

A. Yes. She called the Manager, and the Manager found the Trainman Socks mixed in with these others where she had taken the Railroad Socks from, and I bought two packages of them, one of which is Exhibit 35.

MR. FAIRLEY: Object and move to strike.

THE COURT: Motion overruled, except as to the conversation. That girl did not know her stock, did she?

MR. BELL: That's exactly the point we wanted to make, your Honor.

* * * * *

(tr. 111) Q. Mr. Trotter, I hand you Plaintiff's Exhibit No. 35, which is a package of the Trainman Socks and call your attention to the marking which is at the end of the word "Trainman", the letter "R" in a circle. Can you tell me the significance of that marking?

MR. FAIRLEY: Objection.

A. Yes, that is—

THE COURT: Overruled, if he knows.

A. That is a means provided by the Trademark Statute by which a person, the registrant of a trade-mark, may mark his goods to indicate to the public that he has registered that mark in the United States Patent Office.

Q. Federal Registration?

A. Federal registration. The Statute says right here in (tr. 112) Section 29—

Q. I will read that. (Reading) "Notwithstanding the provisions of section 22 hereof, a registrant of a mark registered under the Act of March 3, 1881, or the Act of February 20, 1905, or on the principal register established by this Act, shall give notice that his mark is registered by displaying with the mark as used the words 'Registered in U. S. Patent Office' or 'Reg. U. S. Pat. Off.' or the letter R enclosed within a circle, thus ® * * *"

Q. Do you know whether—

MR. BELL: Your Honor, this is an extra copy of the Trade-Mark Rules and Statutes for your own use if you would like it.

THE COURT: All right.

Q. (By Mr. Bell) Do you know whether the use of the R within a circle is authorized in any other instance?

MR. FAIRLEY: Objection.

A. No, it is not.

THE COURT: Overruled, if he knows.

Q. Do you know whether the word "Trainman" has actually been registered in the United States Patent Office by Lykens Hosiery?

A. I do know that it has not.

Q. How do you know?

A. I made a rather extensive trade-mark search through (tr. 113) the records to see if that had been registered, and I found that it had not been registered.

Q. I show you Plaintiff's Exhibit No. 42, which is the Lykens Thrift Pack. Do you see the R within the circle associated with that?

A. Yes I do on the front of it, and on the back of the package, with the words "Thrift Pack" alone. It's in both places—the R within the circle.

Q. Do you know whether Lykens has the word "Thrift Pack" registered in the United States Patent Office?

* * * * *

(tr. 114) MR. BELL: I expect possibly the defendant will admit—Will you admit that you do not have any Federal registration on the word "Thrift Pack" or "Trainman"?

MR. FAIRLEY: We admit that we do not have any Federal Registration on the word "Trainman".

MR. BELL: How about "Thrift Pack"?

MR. FAIRLEY: We don't admit that. We don't know.

* * * * *

(tr. 115) Q. (By Mr. Bell) Mr. Trotter, in your investigation, were you able to find any Federal registration of the trade-mark "Thrift Pack"?

MR. FAIRLEY: Objection.

(tr. 116) A. I was not.

THE COURT: I will let it go in, because you say you do not know whether there is or not.

Q. (By Mr. Bell) Mr. Trotter, I hand you registration No. 405,995, and I ask you if, in your search for registrations issued to Lykens, you found that registration?

A. I did.

Q. Did you find any other registration?

A. I did not.

MR. FAIRLEY: Objection.

THE COURT: Overruled.

Q. Will you tell us what that registration was?

A. That is for the word "Lipton," and it was issued to Lykens Hosiery Mills—I am reading from the registration

—"a firm domiciled in Lykens, in the county of Dauphin and State of Pennsylvania, composed of Max Lipschitz and Ira Lipton, of Lykens, Pennsylvania."

MR. BELL: That, we believe, is the plaintiff's proof. That is all.

THE COURT: Do you have any further questions, Mr. Fairley?

MR. BELL: Just a minute, your Honor. I do want to offer this in evidence, which will be Plaintiff's Exhibit No. 47, I believe it is. That is the Lipton Registration.

(PLAINTIFF'S EXHIBIT NO. 47 is filed.)

(tr. 117) MR. FAIRLEY: Are you through with direct examination, Mr. Bell?

MR. BELL: Yes.

CROSS EXAMINATION

BY MR. FAIRLEY:

* * * * *

(tr. 118) Q. I believe you testified, Mr. Trotter, that on (tr. 119) April 2nd and 3rd you went to three different places—one in Pennsylvania and two in New York State—for the purpose of buying Trainman Socks?

A. That is correct.

Q. Did you go for the purpose of buying Trainman Socks or Railroad Socks?

A. I went for the purpose of buying Trainman Socks.

Q. You testified in the first two places there wasn't any

confusion between the two?

A. That is correct.

Q. Now, I will ask you, sir, if you didn't—the purpose of your making these purchases, if your purpose wasn't to try and confuse them?

A. No. My purpose was to prove infringement.

Q. Didn't you testify, Mr. Trotter, that when you ordered the Railroad Socks—I mean, when you ordered the Trainman Socks—that you didn't notice that they had given you Railroad Socks at this third place you went to—Tarrytown, New York—until you started to pay for them?

A. I did. They got them down, and the box—and I said, "I will take two pairs," and as I started to get my money out, and they were pulling them out, and I saw they were Trainman and not—were Railroad and not Trainman.

MR. FAIRLEY: That's all.

* * * * *

(tr. 120) MR. BELL: I would like to put in one word, if I may, at this point, without any long summing up at all. But there is one point I think should be very definitely considered throughout this over-all case, and that is this: That as we discussed this morning, the trade-mark rights are not limited in any way, and the substantive rights are not enlarged by the issuance of a Federal registration. There is no requirement that the owner of that registration use the mark exactly as it is shown, for example. He is entitled to protection on that mark, and consequently, to use that mark. The cases have based similarity on three points, and that is the one thing that I—

THE COURT: We will get his evidence in and—

MR. BELL: Just one word, because I think it is very (tr. 121) important: And that is this: The infringing mark does not have to be exactly alike, but if it is similar in sound, appearance or significance it is infringing—and the word "significance", is the one that I think is important and we would like to keep foremost in our minds as this goes on.

* * * * *

(tr. 142)

IRA LIPTON,

a witness called by and on behalf of the Defendant, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FAIRLEY:

Q. What is your name, sir?
A. Ira Lipton.

Q. Mr. Lipton, I will ask you if you are at the present (tr. 143) time President of the defendant, Lykens Hosiery Mills, Incorporated?
A. Yes, I am.

Q. Mr. Lipton, I will ask you how long—I will ask you when Lykens was incorporated.
A. Lykens Hosiery Mills was incorporated in 1946. I don't know the exact date.

MR. FAIRLEY: Just a moment.

MR. BELL: That is not disputed. We will agree.

THE COURT: In any event, 1946 would be prior to any

difficulty with the plaintiff. I do not imagine it would be necessary to show the exact time.

MR. BELL: We are willing to stipulate.

MR. FAIRLEY: It was incorporated during 1946, under the laws of the State of Pennsylvania.

THE WITNESS: Yes sir.

Q. (By Mr. Fairley) What was its predecessor business, if there were any?

A. Lykens Hosiery Mills was a partnership.

Q. Who were the partners in it?

A. My Father and myself.

Q. What period of time did it operate over?

A. From 1938 to 1946.

Q. What was the predecessor business to that, if there was one?

(tr. 144) A. My Father was in the hosiery business before that in another town in Pennsylvania, and I think the name of the mill was Elizabeth Hosiery Mills, Elizabethville, Pennsylvania.

Q. How long was your father in the hosiery manufacturing business before you and he formed this partnership?

A. I think he started in 1919.

Q. Was the defendant corporation and its predecessors in the hosiery business of manufacturing and selling men's work socks continuously from 1919 up to the present time?

A. Yes sir. As far as I know, we have been—my father and myself have been manufacturing socks since that time, and primarily work socks.

* * * * *

(tr. 145) Q. At the present time and during 1954 and prior to that— for a short period prior to that—in other words, at the present time and at and just prior to the commencement of this suit by the plaintiff in March, 1954, what percentage of your company's business does manufacturing men's work socks constitute?

A. I would say about 95 to 97 per cent of our business is men's work socks.

Q. How long has that been true?

A. Ever since I have been with the company.

Q. Does your company sell its production direct, or does (tr. 146) it sell through wholesalers and distributors?

A. At the present time and since approximately 1949, we have our own selling organization, and we principally sell to the retail and department store trade directly to the retail trade.

Q. Is that selling organization within your own company?

A. Yes sir.

Q. And a part of your company?

A. Yes sir.

Q. I will ask you if since you have been connected with the company whether or not all products manufactured and sold by your company have had on the packaging and on the advertising the name either Lykens or Lipton?

A. Yes sir. As far as I can remember anything, we put out, with our label, we were always very sure to put the name Lykens on it. In other words, we always wanted to promote the word "Lykens" with our trade so that they would know the name and where it came from.

Q. When did your company start using a poly-ethylene

type of package for men's work socks, if you know?

A. To the best of my knowledge, it was in 1950 or '51. We started using a poly-ethylene bag on our Lykens Thrift Pack socks, and I think about the time we were about the first in the work sock field to use a poly-ethylene bag.

(tr. 147) Q. I will ask you if this is the bag, or this is one of the bags that you use?

A. Yes sir.

Q. And still use in packaging your Thrift Pack socks?

A. Yes sir.

Q. Lykens Thrift Pack men's socks?

A. Yes sir.

THE COURT: That is one of those you have there?

THE WITNESS: Yes sir.

Q. I will ask you if the Plaintiff's Exhibit No. 42 does not represent the poly-ethylene type bag that you use in manufacturing and selling Lykens Thrift Pack men's socks?

A. Yes sir.

Q. And that you have been using since about 1950 or 1951?

A. Yes sir.

* * * * *

(tr. 153) Q. When did your company begin using the name Lykens Trainman's Sock, manufacturing Lykens Trainman Socks?

A. To the best of my ability, some time in 1953.

Q. Mr. Lipton, I hand you here the Plaintiff's Exhibit No. 34 and the Plaintiff's Exhibit No. 35, which purport

to be packages of Lykens Trainman Socks.

A. Yes sir.

Q. I will ask you if those fairly represent the old package that you were using?

A. Yes sir.

Q. For that sock?

A. Yes sir.

Q. I will ask you if you changed that package some time during the past year?

(tr. 154) A. Yes sir. After we moved from Lykens, Pennsylvania, down to Marion, North Carolina, we changed our package. And one reason we had to change it was that we no longer were a union shop. On our other package we had union-made, and when we moved down here we didn't have a union shop, so we left that off the package.

Q. Mr. Lipton, I hand you here another package with the name Lykens Trainman Sock on it and ask you to identify it if you can.

A. Yes sir. This is a package we are using currently for our Lykens Trainman Socks.

Q. In what respects, if any, does it differ from the one you were using before?

THE COURT: You have been over that. He said they struck out the word "union-made".

THE WITNESS: Well sir, there are a few other little differences. On this new package we put "two-thread yarn." We changed our construction, and we also made Lykens more pronounced. In other words, we put a block there—black block—to make Lykens more pronounced.

Q. Is there any change in the name in the way Lykens ons or the initial "L" appears on the front of the train?

A. Yes sir. We put Lykens right on the train.

Q. What were you using before on the front of the traitrain, if anything?

(tr. 155) A. We had just a plain "L" on the frofront before.

* * * * *

(tr. 157) Q. (By Mr. Fairley) Mr. Lipton, I hand yd you now two printed forms that purport to be price lists, andand I ask you to identify them, if you can. First, though, what yt you have marked there as Defendant's Exhibit No. 12, what hat is that, if you know?

(tr. 158) A. Yes sir. It is a schedule of prices frofrom January to March, 1954, and it shows the style number, tr, the name, suggested retail description and price per dozen en of our different items.

Q. Including—Does it include the Trainman?

A. Yes sir. It shows Style No. 66, Trainman, and it lt has suggested retail 39, three for $1.15, description 100100% combed half-hose Famous Trainman Poly Bag.

Q. What does it list as the price?

A. At that time the price was $2.65 a dozen.

Q. What is the next exhibit?

A. The next exhibit?

Q. No. 13?

A. Also our price schedule for the fall of 1954, anand it has the styles, the names, suggested retail price, descripption and price per dozen.

Q. Does it include the Trainman Sock?
A. Yes.

Q. Lykens Trainman Sock?
A. Yes sir.

Q. What price does it show? Your selling price for the Trainman?
A. It shows $2.50 per dozen.

Q. These two price schedules were sent out generally by you, were they?
(tr. 159) A. Yes sir.

Q. To your customers?
A. Yes sir.

MR. FAIRLEY: I offer these in evidence as Defendant's Exhibits 12 and 13.

* * * * *

(tr. 169)

CROSS EXAMINATION

BY MR. BELL:

(tr. 171) Q. (By Mr. Bell) I show you a program, which is in evidence as Plaintiff's Exhibit 28, which is dated January 3 to 6. It is the work clothes and sportswear show, and I call your attention to the Trainman ad. Was that about the time of your first advertising of that mark?
A. I don't remember. I would have to consult my records.

Q. The ad says, I believe, "Introducing Trainman."
A. Well, we used that same ad time and time again. In other words, I don't know if this was the first ad that we

had out, but we recently had used the same type of card "Introducing" again.

Q. Did you have any substantial sales of any particular volume prior to January, 1954?

A. (No response.)

Q. You said, I think, you began manufacturing the latter part of 1953.

(tr. 172) A. We had good sales. I would have to consult the records at the mill to tell you how many dozen were sold and when. I don't remember.

Q. Do you know when you introduced the socks publicly to any show prior to January, 1954?

A. Not to my knowledge.

* * * * *

(tr. 173) Q. Thank you. Mr. Lipton, I believe you testified that in all of your advertising—and I emphasize the word "all", because I wrote it down—you used the word Lykens?

A. To the best of my knowledge, yes sir.

Q. I show you an ad in an Army & Navy Store magazine dated May, 1954, as part of Plaintiff's Exhibit 31. Is that your ad?

A. Yes sir.

Q. Do you see the word Lykens with Trainman?

A. I see it over here with Trainman.

Q. Do you see it over here with Trainman, where Trainman is the most predominant word on the ad?

A. No sir, but I see it down here below, "Write Lykens Today." Very clearly.

Q. But you don't see the word Lykens with the big word Trainman?

A. It is right alongside it.

Q. But not right with it? It's over in this other picture.

* * * * *

(tr. 180) Q. You stated with reference to Exhibit 3, the Marine Socks, that you adopted that, you capitalized on the use by the Marine Corps—I believe that was your language, or the substance of it. What did you adopt the Trainman Sock for? Trainman?

A. Why did we adopt it?

Q. Yes.

A. To cater to a certain type of trade in the transportation field.

Q. Railroad trade?

A. Engineers, firemen, bus drivers.

Q. Principally those that worked for Railroads?

A. Worked for railroads, yes sir.

Q. Railroad men, you might say?

A. Yes sir. Also to the working people in transportation.

Q. You stated you sold these initially to railroad men. Do you sell them to all classes of workmen now?

A. Yes sir. I have no knowledge as to who buys the socks now, because our distribution is on a national basis, and I wouldn't know.

Q. As between the words train and railroad. Do you see (tr. 181) any difference in just the words standing alone: train and railroad? Is there any difference in your mind?

A. I don't know what you mean.

Q. Do they mean the same to you?
A. They are two different words.

Q. What do you mean?
A. One is a man. The trainman represents the man.

Q. I said the word train alone, and the other, railroad. Do they mean the same thing to you, or different things?
A. A train is similar to railroad. The word train, yes sir.

Q. I show you price list which is Defendant's Exhibit No. 12. Do you notice the word "Trainman" listed there?
A. Yes sir.

Q. Is the word Lykens used in immediate association with the Trainman?
A. No sir.

Q. Is it used in immediate association with any of the other marks listed there?
A. Yes, in the description column of other styles.

Q. But in the style name, is it?
A. No sir.

Q. I show you Defendant's Exhibit 13, which is a subsequent price list—Fall of 1954—. Do you see the word Trainman on that style listing?
(tr. 182) A. Yes sir.

Q. Does it have the word Lykens with it there?
A. Yes sir.

Q. Do any of the other styles in that style column have the word Lykens with them?
A. No sir.

Q. Why did you ad the word Lykens to Trainman to this list in the fall of 1954 after this suit began?

A. I can't answer that, sir, because I don't know if I made this card up. It may have been someone else who worked for us.

* * * * *

Registered Jan. 12, 1954

Registration No. 584,507

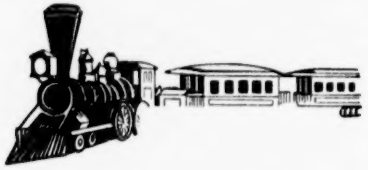
PRINCIPAL REGISTER
Trade-Mark

UNITED STATES PATENT OFFICE

Dwight S. Williams Company, Inc.,
New York, N. Y.

Act of 1946

Application November 19, 1951, Serial No. 621,434



STATEMENT

Be it known that Dwight S. Williams Company, Inc., a corporation duly organized under the laws of the State of New York, and located at New York, New York, and doing business at No. 350 Fifth Avenue, city, county, and State of New York, has adopted and is using the trade-mark shown in the accompanying drawing, for SOCKS FOR MEN, in Class 39, Clothing, and presents herewith five specimens or facsimiles showing the trade-mark as actually used in connection with such goods, the trade-mark being applied to the goods, to tags and labels affixed to the goods, to the containers for the goods and to displays associated with the goods, and requests that the same be registered in the United States Patent Office on the Principal Register in accordance with the act of July 5, 1946.

The trade-mark was first used since 1901, and first used in commerce among the several States of the United States and in commerce between foreign nations and the United States which may lawfully be regulated by Congress since 1901. Applicant is the owner of trade-mark certificate No. 524,743, issued May 2, 1950.

DWIGHT S. WILLIAMS COMPANY, INC.,
By ROBERT D. WILLIAMS,
President.

Registered May 2, 1950 **Registration No. 524,743**

PRINCIPAL REGISTER
Trade-Mark

UNITED STATES PATENT OFFICE

Dwight S. Williams Company, Inc.,
New York, N. Y.

Act of 1946

Application November 10, 1948, Serial No. 568,556

(Statement)

Be it known that Dwight S. Williams Company, Inc., a corporation duly organized under the laws of the State of New York and located at New York, New York, and doing business at No. 350 Fifth Avenue, city, county, and State of New York, has adopted and is using the trade-mark shown in the accompanying drawing, for SOCKS FOR MEN, in Class 39, Clothing, and presents herewith five specimens or facsimiles showing the trade-mark as actually used in connection with such goods, the trade-mark being applied to the goods, to tags and labels affixed to the goods, to the containers for the goods and to displays associated with the goods, and requests that the same be registered in the United States Patent Office on the Principal Register in accordance with the act of July 5, 1946, and section 2(f) thereof.

The trade-mark was first used in 1901 and first used in commerce among the several States of the United States and in commerce between foreign nations and the United States which may lawfully be regulated by Congress in 1901, the said uses being by the predecessor of applicant from whom title was derived.

Applicant disclaims the generic expression "Sock" separately from the mark shown.

(Declaration)

Robert D. Williams being duly sworn deposes and says that he is secretary of the corporation, the applicant named in the foregoing statement; that he believes said corporation is the owner of the trade-mark which is in use in commerce among the several States of the United States and in commerce between foreign nations and the United States which may lawfully be regulated by Congress; that no other person, firm, corporation or association to the best of his knowledge and belief has the right to use said trade-mark in commerce which may lawfully be regulated by Congress, either in the identical form thereof or in any such near resemblance thereto as might be calculated to deceive; that the drawing and description truly represent the trade-mark sought to be registered, that the specimens or facsimiles show the trade-mark as actually used in connection with the goods, and that the facts set forth in the statement are true. Applicant claims the benefits of sec. 2(f) of the act of 1946; and the claim of distinctiveness is based on substantially exclusive and continuous use of the mark by the applicant for a period of five years next preceding the filing of the application, in interstate commerce and in commerce which may lawfully be regulated by Congress.

DWIGHT S. WILLIAMS
COMPANY, INC.,
By ROBERT D. WILLIAMS,
Secretary.

United States Patent Office

600,543
Registered Jan. 4, 1955

SUPPLEMENTAL REGISTER
Trade-Mark

Ser. No. 664,576, filed Apr. 14, 1954

Sock Line of the Nation

Dwight S. Williams Company, Inc. (New York corporation)
350 5th Ave.
New York, N. Y.

For: SOCKS FOR MEN, in CLASS 39.
First used on or about Nov. 1, 1948, and in commerce on or about Nov. 1, 1948.

AUG 9 1950
Clerk

FILED
AUG 9 1956
JOHN T. FEY, Clerk

BRIEF FOR THE RESPONDENT IN OPPOSITION

In The
SUPREME COURT of the UNITED STATES
OCTOBER TERM 1956

No. 254

LYKENS HOSIERY MILLS, INC.,
Petitioner

v.

DWIGHT S. WILLIAMS CO., INC.,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

EATON, BELL, HUNT & SELTZER
904 Johnston Building
Charlotte 2, North Carolina
Attorneys for the Respondent

The Press of Lawyers Printing Co., Inc., Richmond 7, Va.

INDEX

	Page
Statement of the Case	1
Argument:	
The Court of Appeals Did Not Violate Rule 52	4
The Decision Is Not In Conflict With Other Decisions	9
The Decision Is Not In Conflict With Decisions of This Court	11
Conclusion	13

TABLE OF CASES

Soy Food Mills, Inc. v. Pillsbury Mills, Inc., 161 F. 2d 22, certiorari denied 68 S. Ct. 73, 33 U.S. 766, 92 L. Ed. 351	5, 7, 8
Avrick et al v. Rockmont Envelope Co. (C. A. 10. 1946), 155 F. 2d 568, 572-573	6, 7
United States v. United States Gypsum Company et al. 68 S. Ct. 525, 542; 333 U.S. 364, 395; 92 L. Ed. 746, rehearing denied 68 S. Ct. 788; 333 U.S. 869; 92 L. Ed. 1147	7
Miles Shoes Inc. v. R. H. Macy & Co., Inc., (C.A. 2, 1952), 199 F. 2d 602, certiorari denied 73 S. Ct. 650, 345 U.S. 909, 97 L. Ed., 1345.	7, 8

Page

La Touraine Coffee Co., Inc. v. Lorraine Coffee Co., Inc. et al. (C.A. 2, 1946), 157 F. 2d 115, certiorari denied 67 S. Ct. 189, 329 U.S. 771, 91 L. Ed. 663 7

Mishawaka Rubber Co. v. S. S. Kresge Co., 316 U.S. 203, 62 S. Ct. 1022, 86 L. Ed. 1381 12

United Drug Company v. Theodore Rectanus Company, 248 U.S. 90, 39 S. Ct. 48, 63 L. Ed. 141 12

Hanover Star Milling Company v. Metcalf, 240 U.S. 403, 36 S. Ct. 357, 60 L. Ed. 713 12

McLean v. Fleming, 96 U.S. 245 and 24 L. Ed. 828 12

RULES

Rule 52, Federal Rules of Civil Procedure 4, 5, 9

In The
SUPREME COURT of the UNITED STATES

OCTOBER TERM 1956

No. 254

LYKENS HOSIERY MILLS, INC.,
Petitioner

v.

DWIGHT S. WILLIAMS CO., INC.,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

Dwight S. Williams Co., Inc., the Respondent herein and Plaintiff below (hereinafter referred to as Williams) and its predecessors in business have been continuously engaged

in the selling of hosiery since prior to 1911 (13)[1]. Williams' socks are sold under its various trademarks signifying the railroad or train theme throughout the United States through wholesale distributors who in turn sell to retailers (14, 46).

Robert P. Steele & Co., a predecessor in business of Williams adopted and began using as a trademark for men's hosiery the pictorial illustration of a train in connection with the words "*The* RAILROAD *Sock*" sometime prior to July 1913 (45). The trademark "*The* RAILROAD *Sock*" has been continuously used by Williams since its adoption prior to July 1913 until the present time in connection with its sales of men's work socks (20, 45). Throughout this long period of continuous usage, Williams and its predecessors in business have used the mark in various ways, such as "*The* RAILROAD *Sock*" alone (13) and in combination with pictorial illustrations of trains, both modern and old types. In carrying out its train and railroad theme in connection with its sales of men's work socks, Williams has, since at least as early as 1950 and long prior to Defendant's entry into the field, used in association with its trademark "*The* RAILROAD *Sock*", both in packaging and advertising, various railroad and train insignia and pictorial illustrations, all of which emphasize the train and railroad theme carried out by Williams (24).

On July 10, 1913, Plaintiff's predecessor, Robert P. Steele & Co. applied for a copyright on the label it was then using which showed the pictorial representation of a train

[1] Unless otherwise indicated, all page references are to the printed Appendix to the brief of Appellant Dwight S. Williams Co., Inc. as printed for the use of the Court below.

and "*The* RAILROAD *Sock*", and on November 18, 1913, the United States Patent Office issued a Certificate of Copyright, No. 3424, covering said label (20, 21).

Williams is the owner of the following trademark registrations:

Registration No. 524,743, issued May 2, 1950, for THE RAILROAD SOCK and the pictorial representation of a modern locomotive and train (15).

Registration No. 584,507, issued January 12, 1954, covering the pictorial illustration of an older type locomotive and train (15).

Registration No. 600,543, issued January 4, 1955, for SOCK LINE OF THE NATION (18).

Registration No. 602,189, issued February 15, 1955, for THE RAILROAD SOCK.

All of the aforesaid registrations cover the respective marks for use by Williams in its sale of men's socks, and pertain to the general railroad and train theme used by Williams in the selling of its men's work socks.[2]

Williams and its predecessors in business have spent large sums of money in advertising and popularizing "*The* RAILROAD *Sock*" mark and in emphasizing the general

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[2] Copies of Williams registered marks follow Page 71 of the Appendix to the Brief of Appellant Dwight S. Williams Co., Inc. as printed for the use of the Court below.

train theme in connection with its sale of men's work socks (29).

Lykens Hosiery Mills, Inc., the Petitioner herein and Defendant below (hereinafter referred to as Lykens) has its manufacturing plant located in Marion, North Carolina and is engaged in the business of manufacturing and selling men's hosiery, including men's work socks (62, 63 and 65).

In the latter part of 1953, Lykens began manufacturing and shortly thereafter selling and distributing men's work socks throughout the United States under the name and style TRAINMAN with a pictorial illustration of a train (64). Williams, through its attorney, promptly notified Lykens of Williams' rights and trademarks and complained of Lykens use of the word TRAINMAN and the pictorial illustration of a train in connection with Lykens sales of men's work socks (33). Lykens has nevertheless continued to sell men's work socks on an expanding nationwide basis under the TRAINMAN name in packages bearing pictorial illustrations of trains (69).

On the trial of the case in the United States District Court for the Western District of North Carolina the trial court held that there was no infringement by Lykens and that Lykens was not guilty of unfair competition. This decision was properly reversed by the Court of Appeals for the Fourth Circuit.

ARGUMENT

The Court of Appeals Did Not Violate Rule 52

The first question Petitioner would have this Court review is whether the action of the Court of Appeals in re-

versing the decision of the District Court was violative of Rule 52 of the Federal Rules of Civil Procedure. The law is well settled on this point that the Court of Appeals had the clear right, and indeed the duty, to review the record on appeal and decide for itself whether there was infringement and unfair competition. *Soy Food Mills, Inc.* v. *Pillsbury Mills, Inc.*, 161 F. 2d 22, certiorari denied 68 S. Ct. 73, 332 U.S. 766, 92 L.Ed. 351.

The District Court failed to give any consideration to Williams' long prior usage of marks and labels signifying a railroad or train theme, and the opinion of the Court of Appeals makes it clear that Williams is rightly entitled to "rather broad rights" [3] because of such long prior usage.

It is also evident from the opinion of the Court of Appeals that it regarded the District Court's finding of no similarity between the labels of the respective parties as "clearly erroneous" within the meaning of Rule 52 of the Federal Rules of Civil Procedure. The District Court opinion clearly states that the trial Judge based his finding not on the testimony of witnesses but entirely upon an ocular side-by-side comparison of the labels of the respective parties:

> "After a careful and painstaking study of the label, the contents, markings, get up and the over all appearance of each, I come up with the conclusion that there is no similarity in the two labels and that no confusion would likely result to a purchaser who would exercise ordinary care and prudence." (8) (See also 135 F. Supp. 213, 217).

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[3] Page 22 of Appendix to Petition.

On appeal by Williams to the Court of Appeals for the Fourth Circuit, the Court of Appeals quoted the foregoing passage from the District Court opinion with disapproval and stated:

> "With this we cannot agree.
>
> "We think the District Judge laid too much stress on the ocular comparison of the packages of Williams and Lykens, when laid side by side. The test here is not *solely* such a juxtapositional comparison. The whole background of the case must be considered. Yet we do find here striking similarity between the two packages, in which the socks of Williams and those of Lykens are sold, in color, shape and general pattern." [4]

After declaring that the District Judge laid too much stress on the ocular comparison of the packages of the respective parties when laid side by side, the Court of Appeals quoted with approval from the opinion of Circuit Judge Murrah in the case of *Aviick et al.* v. *Rockmont Envelope Co.* (C.A. 10, 1946), 155 F. 2d 568, 572-573:

> "It is contended that the trial court merely made a side by side visual comparison of the two specimens, and judged the question of infringement solely by the reaction of his trained mind to such comparison. It is not the distinguishing details manifest by ocular comparison in juxtaposition which determines confusing similarity, the text is more objective than that. It is the total effect produced by the designation in the mind of the ordinary purchaser exercising due care in the mar-

[4] Page 24 in the Appendix to the Petition.

ket place. A prospective purchaser does not ordinarily carry a sample or specimen of the article he knows well enough to call by its trade name, he necessarily depends upon the mental picture of that which symbolizes origin and ownership of the thing desired." [5]

It is submitted that the Court of Appeals rightly regarded the finding of lack of similarity between the respective labels to be clearly erroneous.

Mr. Justice Reed speaking for this Court in the case of *United States* v. *United States Gypsum Company et al*, 68 S. Ct. 525, 542; 333 U.S. 364, 395; 92 L. Ed. 746, rehearing denied 68 S. Ct. 788; 333 U. S. 869; 92 L.Ed. 1147, defined the intention of Rule 52a by declaring that:

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing Court on the entire evidence is left with the definite and firm conviction that a mistake has been commited."

This interpretation of Rule 52 of the Federal Rules of Civil Procedure has been followed by the Courts of Appeals for the various circuits. *Miles Shoes Inc.* v. *R. H. Macy & Co., Inc.* (C.A. 2, 1952), 199 F.2d 602, certiorari denied 73 S.Ct. 650, 345 U. S. 909, 97 L.Ed. 1345; *Soy Food Mills, Inc.* v. *Pillsbury Mills, Inc.* (C.A. 7, 1947), 161 F.2d 22, certiorari denied 68 S.Ct. 73, 332 U. S. 766, 92 L.Ed. 351; *LaTouraine Coffee Co., Inc.* v. *Lorraine Coffee Co., Inc. et al.* (C.A. 2, 1946), 157 F.2d 115, certiorari denied 67 S.Ct. 189, 329 U. S. 771, 91 L.Ed. 663; *Azrick et al.* v.

[5] Pages 24 and 25 in the Appendix to the Petition.

Rockmont Envelope Co., 155 F. 2d 568 (C.A. 10, 1946.)

In *Soy Food Mills, Inc.* v. *Pillsbury Mills, Inc.*, supra, at Page 25, the Court stated:

> "Just as a finding of the District Court is not conclusive where the evidence is by deposition—equally open to both Courts—so is the question presented by the use of trade names open to both lower and appellate Courts for their separate determination as to confusing similarity.
>
> We are of the opinion that not only is the factual question thus open to the appellate Court, but it is our unavoidable duty to examine the two trademarks or trade names or copyrights and decide the question of fact for ourselves."

Again, in *Miles Shoes, Inc.* v. *R. H. Macy & Co., Inc.*, supra, at Pages 602-603 the Court declared that:

> "Where the question of confusing similarity is based solely on the marks themselves, this Court has said that: '* * * we are in as good a position as the trial judge to determine the probability of confusion.'" (citing cases).

Petitioner's argument on Page 9 of the Petition that there is substantial evidence to sustain the findings of the District Court and that such findings cannot be said to be erroneous because the credibility of witnesses is within the province of the trier of facts is both misleading and untenable. There was no testimony as to the absence or presence of likelihood of confusion by ordinary purchasers and

the only evidence on this point is furnished by the labels and exhibits. The opinion of the District Court makes it very clear that its conclusion was not based on the testimony of witnesses, but was made only after "a careful and painstaking study of the label, the contents, markings, get up and the overall appearance of each". (8).

For the foregoing reasons it is submitted that the reversal by the Court of Appeals of the District Court was not violative of Rule 52 of the Federal Rules of Civil Procedure.

The Decision Is Not In Conflict With Other Decisions

The next question which Petitioner would have this Court consider is whether the decision of the Court of Appeals for the Fourth Circuit in this case is in conflict with the decisions of the various other Courts of Appeals. The large number of cases from other circuits cited in the opinion of the Court of Appeals make it clear that its decision in this case is not in conflict with decisions of other Courts of Appeals.

The cases noted on Pages 10 and 11 of Petitioner's Brief wherein certain marks were held not to infringe certain other marks are not at all pertinent to this case. In the first place, there is no indication as to the nature of the goods upon which the respective marks are used, and secondly most of the marks noted do not appear to have any particular significance.

It is the striking similarity between the significance of the word RAILROAD as used by Williams and the word

TRAINMAN as used by Lykens which compelled the Court of Appeals to reverse the District Court in this case. In contrast to the marks noted on Pages 10 and 11 of the Petition, attention is invited to the marks contained in the opinion of the Court of Appeals wherein a similarity in significance was found to be such as to render the marks confusingly similar.[6]

Petitioner argues on Page 11 of the Petition that:

> "The effect of the decision of the Court of Appeals is two-fold: (1) To ignore completely the existence of at least twenty-three (23) prior registered trademarks dealing with wearing apparel (Plaintiff's Exhibit 7, R., p. 15) containing a pictorial illustration of a train or in some way related to trains; (2) to grant Plaintiff the exclusive right to a pictorial representation of a train that has been and is *publici juris*."

As to Item 1, the alleged use by others of the pictorial illustration of a train, as set forth by Petitioner, is contrary to fact and completely misleading. No evidence was presented at the trial to show any such use by other concerns *in connection with men's hosiery*. The trademarks "*The* RAILROAD *Sock*" and the pictorial illustration of a train are used by Williams on socks for men, and Williams does not claim any rights to this or similar marks for goods of different descriptive properties.

The twenty-three prior registered trademarks noted by Petitioner were cited in Petitioner's Answer to the Complaint, but these registrations were never offered in evidence

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[6] Pages 23 and 24 in the Appendix to the Petition.

by Lykens. In fact, status copies of these registrations were placed in evidence by Williams (Plaintiff's Exhibit 7, R. p. 15) and it was noted at the trial that out of the entire group of registrations only six remain unexpired and these did not relate to hosiery and no proof was offered with respect to their present usage. Only one of the twenty-three registrations cited by Lykens related to hosiery and that registration expired some twenty-five years ago.

As to Item 2, Petitioner's attempt to argue that Plaintiff's trademark is *publici juris* is simply not supported by the facts. The District Court did not make such a finding and Defendant did not file a cross appeal on this point. The word RAILROAD is completely arbitrary as applied to men's socks and is not in any way descriptive of the goods with which the mark is used by Williams. Therefore, the cases relied upon by Petitioner[7] to show that the Courts refuse to grant monopolies on words within the public domain because descriptive of the goods to which they are applied are not at all pertinent to the instant case.

It is accordingly submitted that the decision of the Court of Appeals is not in conflict with the decisions of other Courts of Appeals.

The Decision Is Not In Conflict With Decisions of This Court

The third and last question presented by the Petitioner is whether the decision of the Court of Appeals in this case is in conflict with the decisions of this Court. Only one

[7] Page 13 of the Petition.

decision of this Court is cited by Petitioner in suppo its contention that a writ of certiorari should be grant this ground. The cited decision is the case of *Misha Rubber Co.* v. *S. S. Kresge Co.*, 316 U. S. 203, 62 1022, 86 L.Ed. 1381[8], wherein this Court reversed the Court and held for Plaintiff on the measure of dam while specifically declining to disturb the lower C finding of infringement. Accordingly, this case is benefit to Petitioner.

The Court of Appeals for the Fourth Circuit relied a number of prior decisions of this Court in reachi holding of infringement and unfair competition by L Among the cases cited by the Court of Appeals are: *waka Rubber Co.* v. *S. S. Kresge*, 316 U. S. 203, 62 1022, 86 L.Ed. 1381[9]; *United Drug Company* v. *Th Rectanus Company*, 248 U. S. 90, 39 S.Ct. 48, 63 141[10]; *Hanover Star Milling Company* v. *Metcalf*, 240 403, 36 S.Ct. 357, 60 L.Ed. 713[11]; and *McLean* v. *Fl* 96 U. S. 245 and 24 L.Ed. 828[12].

Rather than being in conflict with the decisions o Court, the decision of the Court of Appeals is clea accord with such decisions.

It is accordingly submitted that Petitioner has mis showing that the decision of the Court of Appeals conflict with the decision of this Court.

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[8] Page 14 of the Petition.

[9] Page 22 of Appendix to Petition.

[10] Page 21 of Appendix to Petition.

[11] Page 21 of Appendix to Petition.

[12] Page 21 of Appendix to Petition.

CONCLUSION

Upon the facts hereinabove outlined and for the reasons herein set forth, the Respondent prays that the Petition for Writ of Certiorari be denied.

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